

JUDICIAL APPROACHES TO MEANING  
IN THE INTERPRETATION OF STATUTES

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## ABSTRACT

Statutes are a written communication between Parliament and the legislative audience. Statutory interpretation is the process whereby the legislative audience seeks to understand and thereby govern its actions by the dictates of Parliament. Judicial interpretation occurs only when there has been some breakdown in this process - either Parliament has failed to express its ideas clearly or those ideas are incapable of precise expression. A broad aim of this thesis is to examine the functioning of language and the communication process with a view to understanding more clearly the nature of meaning and its ascertainment. An analysis will be made of those features of language giving rise to uncertainty and so to the problem case of interpretation. An analysis will also be made of the nature of linguistic certainty; it is hoped that a better understanding of the ingredients of successful communication will eventually lead to the reduction of statutory doubt. Next the theory of judicial interpretation will be considered and its correspondence to accepted linguistic theory assessed. Particular emphasis will be placed on a discussion of the adequacy of the traditional canons. Finally judicial practice will be considered by means of a survey conducted from two years of the New Zealand Law Reports. The results from this survey will then be compared with earlier findings from the thesis. Conclusions of a general nature will be drawn; in particular

it will be submitted that a shift in the dominant paradigm applicable to the construction of statutes is presently under way in New Zealand. The traditional canons are being replaced by a more unified and consistent paradigm whose features include liberalisation of the literal rule to encompass consideration of context, including the statutory purpose, and explicit provision for assessment of consequences. This new paradigm is more adequate than the traditional canons and Section 5(j) both as a source of reasons for meaning and reasons for decision.

## PART A: UNDERSTANDING MEANING

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### INTRODUCTION

A distinction is frequently made between two stages in the interpretative process, interpretation and application. 'Interpretation' is concerned principally with the ascertainment of statutory meaning; 'application' with the relationship of that meaning to the facts of a case. If one can accept such a distinction, this thesis can be described as having as its primary concern an analysis of the former. Its broad aim is to clarify and analyse judicial approaches to the ascertainment of statutory meaning.

Broadly speaking, statutes are a form of communication between Parliament and the legislative audience. In their modern day form they operate through the medium of written language and are subject to the normal functioning of the English language. In Part A, therefore, we shall attempt to understand something of the semantic and philosophical nature of meaning. Because all successful communication is dependent upon an element of linguistic certainty, we will look at what makes meaning 'clear'. And because interpretation always arises in the context of some dispute arising from the breakdown of the statutory communication, we will look at linguistic uncertainty and its potential for giving rise to the problem case. Finally, we will look at classification and its relationship to meaning. In

theory 'classification' can relate either to the definition of statutory terms or to the application of that definition to the facts of a case. But as in the latter sense classification in fact provides a more precise definition of statutory terms, the distinction is by no means clear-cut. Indeed, the same can be said of the interpretation/application distinction itself. On closer examination the distinction largely appears to be an artificial one devised for ease of analysis by legal commentators. Judicial practice does not reflect any such clear distinction. 'Meaning' is an ambiguous term which relates to 'scope' as well as to 'sense'. Before going on to a consideration of judicial approaches to meaning, we must attempt to understand something more about meaning itself.

## CHAPTER I

## THE MEANINGS OF MEANING

The word 'meaning' is perhaps one of the most ambiguous words in the English language. It is used in a wide range of contexts in several different senses. C.K. Ogden and I.A. Richards in their book 'The Meaning of Meaning' list as many as twenty-two definitions of the word.<sup>1</sup> Among them they include:

- an intrinsic property
- the other words annexed to a word in the dictionary
- the connotations of a word
- that to which the user of a symbol actually refers
- that to which the user of a symbol ought to be referring
- that to which the user of a symbol believes himself to be referring
- that to which the interpreter of a symbol
  - (a) refers
  - (b) believes himself to be referring
  - (c) believes the user to be referring

Much of the conflict between these definitions is explicable by reference to the purpose for which they are formulated. Specialists in different fields feel the need to tailor the study of meaning to the requirements of their own discipline.<sup>2</sup> This will be

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1. C.K. Ogden and I.A. Richards, 'The Meaning of Meaning' (1923) pp. 186-7.
  2. G. Leech, 'Semantics', p.4. "So, a philosopher may define meaning for his purposes in terms of truth and falsehood; a behaviourist psychologist in terms of stimulus and response; a literary critic in terms of the reader's response; and so on . . . "

illustrated more clearly in the following chapter in which we look at some of the many different theories as to what meaning actually is. Whatever the reasons for the multiplicity of definitions, there can be no doubt about the problems they cause. Confusion or misunderstanding often arises in discussions concerning meaning as a consequence of fundamental disagreement about the term itself. The situation is probably made worse by problems of demarcation. The several meanings are often interconnected, and shade into one another in various ways.<sup>3</sup>

It would be foolish to commence a discussion of judicial approaches to meaning with any false idea that the 'meaning' referred to is a simple and easily definable concept. Likewise, it would be a mistake to attempt any precise definition of 'meaning' before discussion of the subject begins.<sup>4</sup> The formulation of such a definition could well be an impossible task; it is extremely unlikely that all judicial statements concerning 'meaning' use the term in precisely the same way. We must be content with letting the meaning of 'meaning' as used by the judiciary emerge from the study itself. However, it is possible, indeed desirable, to consider in advance the varieties of meaning with most relevance to the lawyer. One relevant categorisation is the distinction between intended, comprehended and ordinary meaning.<sup>5</sup>

Broadly speaking, communication consists of the

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3. J. Lyons, 'Language, Meaning and Context', p. 15.

4. Compare the approach of G. Leech op. cit. p.4.

5. See G. Williams 'Language and the Law' 61 L.Q.R. 71 at 390.

transference of information from the communicator to the audience. It is arguable that successful communication occurs only when what was in the mind of the communicator has been transferred to, or copied in, the mind of the audience.<sup>6</sup> Presumably, successful communication in legal terms consists of the unproblematic 'clear' case, where individual members of the statutory audience govern their behaviour in terms of the statutory instrument in the manner intended by Parliament. Problems of interpretation arise where communication has somehow broken down. The message intended by the legislature is not that comprehended by the individual member of the legislative audience. For the linguist, meaning is neutral between 'speaker's meaning' and 'hearer's meaning'.<sup>7</sup> This is not so for the lawyer. Important consequences attach to construction of the legislative message by the judiciary. Some uniform standard of construction is necessary to ensure the proper administration of justice. This is where the distinction between intended, comprehended and ordinary meaning is of importance. The general theory with regard to statutes is that the court is concerned with the meaning of the authors.<sup>8</sup> Frequent reference is made to the intention of Parliament. In practice, however, the refusal to look at certain extrinsic material in the ascertainment of this intention means that their concern is not with the actual meaning of Parliament but with a

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6. G. Leech op. cit. p.24. Cf N. Jamieson, 'Towards A Systematic Statute Law' (1976) 3 Otago L.R. 543; 544.

7. Ibid. p.24.

8. See G. Williams, op. cit. p.392.

meaning imputed to Parliament. Having largely restricted themselves to a consideration of the statutory words, the meaning imputed to Parliament is in fact the usual meaning in which the words that Parliament used to express its actual meaning are commonly employed.<sup>9</sup> In other words, Parliament is presumed to have used words in their ordinary sense unless the context or statutory purpose indicates otherwise. Ordinary meaning can be distinguished from comprehended meaning, which is the meaning actually attached to the statutory words by a particular reader or hearer.<sup>10</sup> The latter is not the concern of the courts.<sup>11</sup> Reference to the 'proper' meaning of statutory language is a reference to its ordinary meaning or, in certain cases, to some specially assigned meaning. Apart from these, words have no 'actual', 'correct', 'essential', 'grammatical', 'legitimate', 'literal', 'natural', 'necessary', 'rational', 'real', or 'reasonable' meaning.<sup>12</sup>

Related to the classification of various senses of 'meaning' is classification of the various methods used to arrive at that meaning. M.M. Bryant<sup>13</sup> has identified thirteen different classifications into which cases involving the definition of a word may fall. These are:<sup>14</sup>

- (1) literal interpretation
- (2) interpretation based on intent
- (3) interpretation based on putative intent
- (4) interpretation suggested by fact
- (5) common meaning

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9. Ibid. p.393.

10. Ibid. p.393.

11. Compare the general issue of consideration of linguistic register. See pp. 126-129

12. G. Williams, op. cit. p.384.

13. M.M. Bryant, 'English in the Law Courts'.

14. Ibid. p.26.



- (6) specialised meaning
- (7) technical meaning
- (8) interpretation suggested by technical terms
- (9) dictionary meaning
- (10) etymology
- (11) historical development
- (12) context
- (13) circumstances

Classifications (1), (5), (10) and (11) in particular need defining so as to avoid possible confusion. Bryant uses the phrase "literal interpretation" to refer to that which a word actually denotes in its usual construction, according to the authorities on standard English; that is, its standard meaning, unexaggerated or unembellished in any way and regardless of its connotative value. The "common meaning" differs from the literal meaning and the etymological meaning in that it is the meaning understood by the masses, the one accepted in ordinary speech. "Etymology" has to do with the origin or derivation of a word as shown by its analysis into elements. The etymological study of a word deals with its original constituent elements. In cases decided according to etymology the judges have gone back to the original meaning of the word as shown in the parent language (Latin, Anglo-Saxon, French, etc.). "Historical development" traces the history of a word, noting the different meanings that have been recognised from time to time, without going back to its original meaning. As to the remaining classifications, "interpretation based on intent" refers to the actual intended meaning of the communicator. "Interpretation based on putative intent" refers to the meaning the court thinks the communicator would have intended had such a situation occurred to it.

In an "interpretation suggested by fact" the word takes on a meaning according to the facts of the case.

"Specialised meaning" refers to a meaning assigned to a particular use or function. "Technical meaning" refers to meanings peculiar to any trade, profession or the like.

"Interpretation suggested by technical terms" is similar to classification (7); the technical terms surrounding the word cause it to take on a peculiar meaning. In the case of "dictionary meaning" the dictionary is returned to and the definition found there is used. A decision based on "context" is made according to the meaning a word acquires in relation to the subject matter. Finally, in a decision based on "circumstances" the import of the disputed word is determined by the surrounding circumstances.<sup>15</sup>

The above classification is considerably more detailed than that adopted by most legal writers. For this reason Bryant's terminology also differs from that of many other writers.<sup>16</sup> The classification is valuable in that it provides some insight into the wide range of possible approaches to meaning. Both in theory and in practice the ascertainment of meaning is far more complex than a simple application of one of the three traditional

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15. The above analysis of terms used comes from Bryant herself. See pp. 26-29.

16. For example while most writers simply equate literal meaning with ordinary meaning, Bryant seems to equate ordinary meaning with "common meaning" and distinguishes this from "literal meaning."

canons.<sup>17</sup> Any discussion of judicial approaches to meaning will be far from clear-cut. The sense in which 'meaning' is referred to by the judiciary must be left to emerge from the following chapters. It will be interesting to note whether judicial use of the term corresponds to that of the linguist.

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17. That is, application of either the literal, golden or mischief 'rules'.

## CHAPTER II

## THEORIES OF MEANING

## I. INTRODUCTION.

A study of meaning would be incomplete without some preliminary investigation into the general theories of meaning. Such theories underlie all our thoughts about the ascertainment of meaning. Reference to them explains many of the differences between legal commentators on the question of how statutory meaning is best ascertained. For illustration one need look no further than the debate as to whether 'clear' meaning can be determined irrespective of context and statutory purpose. Essentially this was the subject of dispute between H.L.A. Hart and L.L. Fuller in their well-known debate concerning 'core' and 'penumbra'.<sup>1</sup> Whereas Hart appears to adopt a word-by-word approach to meaning, Fuller adopts a contextual approach. Until the unlikely event of agreement being reached on the nature of meaning, we cannot hope to see universal agreement on the means by which that meaning is to be ascertained.

The relationship of the following theories to interpretation can be likened to that of the dominant paradigm to scientific research. T.S. Kuhn<sup>2</sup> has written

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1. See pp. 36-42.

2. T.S. Kuhn, 'The Structure of Scientific Revolutions' reprinted in part in Bishin and Stone, 'Law, Language and Ethics: An Introduction to Law and Legal Method' at pp. 624-6.

that such research takes place under the influence of dominant paradigms, or theories. Change in the dominant paradigm necessitates fundamental change in the approach to research. The same idea could arguably be applied to statutory interpretation. Perhaps as lawyers we should be prepared to adapt our attitudes and approaches to the ascertainment of statutory meaning as the theories upon which those attitudes are based change and develop with the advance of linguistic science.

The following discussion of some of the dominant theories of meaning will not be <sup>undertaken</sup> done in any depth; this is not a thesis on philosophy or semantics. It is merely intended to give a general understanding of the theories and to make future references intelligible.

## II. WORDS AS SYMBOLS

Most of us understand the things we read to have a more or less certain meaning. Few of us stop to think what the meaning consists of and how it is deduced. Language clearly consists of something more than just lines drawn on paper; the physical substance of the text has no meaning in itself.<sup>3</sup> We, the readers, bestow meaning on the print by virtue of the symbolic function of language. Language is thus part of a general theory

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3. This assumption has not always been made. At times throughout history words have been thought to possess a 'magical' significance, the very words themselves possessing some mysterious force. On this question of the magical significance of words and how it relates to law see 'Law As Fact' by K. Olivecrona pp. 240-245; 'Language and the Law' by G. Williams 61 L.Q.R. 71 at pp. 74-78.

of signs; sign is the genus, symbol the species. As with all signs, words represent something other than themselves.<sup>4</sup>

The most useful classification of signs for present purposes is that which distinguishes between natural signs and symbols. The distinction lies in the different relation each bears to its referent. Natural signs are correlated to their referents in some inevitable or 'natural' way, i.e. the correlation is based on the interplay of natural events. Their significance to the observer is based on the observer's experience or knowledge of this interplay of events.<sup>5</sup> The wetness of the earth, for example, signifies a recent fall of rain. Experience has taught us that rain and wetness are correlated in a certain way; that whenever rain falls the ground is left wet.

Symbols, on the other hand, are constituted signs merely by the fact that they are understood as such. No correlation need exist between sign and referent (except of course an indirect correlation in the sense that the sign is habitually used to refer to a particular referent). In this way we interpret a traffic light showing red to mean 'STOP'. This meaning results, not from any natural correlation between lights and stopping, but because our society dictates that for purposes of safety we are to stop at red lights. The choice of symbol is purely

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4. See C.S. Pierce, 'Collected Papers' Vol. II para 223 - "A sign . . . is something that stands to somebody for something in some respect or capacity".

5. A. Ross, 'On Law and Justice', p. 112.

arbitrary. Likewise with language an artificial relation exists between a term and that to which it refers. A word has no 'natural' or 'inherent' meaning. Of course, once a pattern of usage has established itself, the need for consistency dictates that a particular term be used only in accordance with the established pattern. Successful communication depends on adherence to the established use-patterns. Indeed many would argue that words acquire meaning by reason of the linguistic rules in force in a particular speech community which govern their use and determine that they be used in certain ways only.<sup>6</sup>

The term 'conventional' is often used to describe this feature of the use of words. Unfortunately the term often carries unjustified and probably untrue assumptions about the origins of language.<sup>7</sup> Take for instance the following statement:

"... A symbol such as a word designates a referent by agreement or convention. Human decisions are thus required in order to establish the meaning of symbols and such decisions are arbitrary ones . . . Names arise as a result of human agreements or stipulations."<sup>8</sup>

This can be compared with the more careful comments of A. Ross.<sup>9</sup> The description of symbols as 'conventional', he says, refers to the fact that "the connection between the symbol and what it symbolises is brought about by human beings through agreement or usage (custom)".<sup>10</sup>

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6. For example, see W.P. Alston, 'Philosophy of Language', p. 58.

7. Ibid. p.56.

8. L. Ruby, 'Logic' p. 20 (see Alston ibid. p. 57).

9. op cit.

10. Ibid. pp. 112-115.

This reference to usage is more to the point. Language could not have been originated by having decisions adopted by common convention, for making agreements and conventions presupposes that people already have a language in which to carry on these activities.<sup>11</sup> Of course in cases of technical terminology such a process could well lead to an explicit proposal for a new sense of a word to be adopted, but such cases are the exception. What little is known about the origins and development of language indicates that the process is largely an unconscious affair with linguistic habits getting established without any person or group of persons trying to establish them.<sup>12</sup>

Language is often described as a "system of symbols".<sup>13</sup> W.P. Alston<sup>14</sup> gives a three-part elaboration of the sense in which a system is inherent in language. First, the elements of language, for example words, are combinable in some ways but not in others. The meaning of the combination is a determinate function of the meanings of the constituents and their mode of combination. Secondly, each constituent word of a sentence can be replaced by some words but not by others. And thirdly, a transformation of a sentence in a certain way can produce a new sentence, with a certain alteration in meaning attaching to a certain transformation.

If we accept the above, then we must also accept that no symbol in the system is what it is independent of its involvement in the system, so that it could be

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11. W.P. Alston, op. cit. p. 57.

12. Ibid. p. 57.

13. See for example, A. Ross op. cit. p. 113.

14. op. cit. p. 60.



just the same symbol if it were in no system at all.<sup>15</sup>

We will examine this proposition more fully below.

### III. REFERENTIAL THEORIES OF MEANING

The fact that words are symbols referring to something other than themselves provides the basis for the referential theories of meaning. Such theories recognise an essential connection between language and 'the world'.<sup>16</sup> Every meaningful expression is said to 'name' something.

John Stuart Mill provided one of the first influential discussions on the nature of meaning and himself adopted a referential approach.<sup>17</sup> His account started with a consideration of single words. It seemed natural to suppose that sentence meanings were the compounds of their components, the meanings of individual words.<sup>18</sup> In Mill's opinion all words 'name' something, whether it be a thing, a kind of thing, a quality, a relationship or something else. Names need not only be single words. Complex descriptive phrases can also name that to which they refer.

Any theory which simply equated the meaning of an expression with its referent would be far from adequate. 'The President of the U.S.A. in 1962' and 'The U.S.

15. Ibid. p. 60.

16. Ibid. p. 19.

17. See J.S. Mill, 'System of Logic' (1843)

18. See G. Ryle in 'The Theory of Meaning' from 'British Philosophy in the Mid-Century' reprinted in part in Bishin and Stone, 'Law, Language and Ethics' at p.531.

President assassinated in Dallas' both obviously refer to John F. Kennedy, but their meaning is not the same. Likewise, an expression might refer to some non-existent person or thing, such as 'The first man to set foot on Mars'. Mill recognised this inadequacy and attempted to meet it with his famous theory of connotation and denotation. He realised that a word need not always denote somebody or thing for it to have meaning. Meaning must consist of something more than mere identification of a referent. Mill's theory of connotation and denotation describes the two-fold functioning of most words and phrases. Not only do they denote the things that they are the 'names' of, but they also connote the simple or complex attributes by possessing which the thing denoted is fitted by the description.<sup>19</sup> 'The President of the U.S.A. in 1962' and 'The U.S. President assassinated in Dallas' differ only in connotation. Their denotation remains the same. And while some words can be connected with distinguishable components in the world, others cannot. In the latter case meaning also takes the form of connotation.

If in cases such as the above meaning is to be found not in denotation but in connotation, can we not conclude that the meaning of an expression is never the person or thing referred to by it? Any general account of meaning must be capable of consistent application to all meaningful expressions. A preferable version of the referential theory therefore identifies meaning with the relationship between the expression and its referent, i.e. with the referential connection itself.

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19. See G. Ryle Ibid. p.533.

Whatever approach is adopted, it is questionable whether a referential theory can deal adequately with words such as 'and', 'of', 'the'. It seems extremely artificial to describe such words as 'names' of anything. Mill's treatment of such words as ancillaries to 'many-worded names' is hardly satisfactory. Indeed it is inconsistent with the rest of his thesis that all words name things. Furthermore can we really describe language as consisting of a sequence of labels, whatever those labels signify?<sup>20</sup> Surely words combined into a sentence do something jointly which is different from them severally naming whatever they do name. Language, remember, has been described as a system of symbols. This failure to account adequately for the relationship between words is one of the major <sup>defects</sup> downfalls of the referential theory. The insight into the nature of language on which the theory is based seems to have been ruined by oversimplification.<sup>21</sup>

#### IV. IDEATIONAL THEORIES OF MEANING

To a certain extent we express and communicate our thoughts when using language. Adherents to the ideational theory of meaning would carry this to the extent of saying, as John Locke did, that "the use of words . . . is to be sensible marks of ideas, and the ideas they stand for are their proper and immediate signification."<sup>22</sup>

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20. W.P. Alston, op. cit. p.19.

21. Ibid. p. 19.

22. John Locke in 'Essay Concerning Human Understanding' Book III Ch.s., section 1.

Such an assumption underlies all theories holding language to be an instrument for the communication of thought. As all thought is internal and unobservable, some external symbol capable of being generally understood is necessary for its communication. Words provide the symbol and their meaning is derived from their regular use in communication as 'marks' of particular ideas. But the ideas with which we do our thinking have an existence and function independent of language.<sup>23</sup> To the extent that words symbolise or refer to ideas this theory can be compared with those already discussed above. It is also worth noting the possible conceptual overlap with the referential theory that holds the referential connection itself to comprise a word's meaning.

W.P. Alston identifies three conditions that would have to apply for such a theory to work.<sup>24</sup> Firstly, a particular idea must be present in the mind of the speaker. The speaker must be using a particular linguistic expression to communicate the presence of this idea in his mind. And finally, if the communication is to be successful, the expression used would have to call up the same idea in the mind of the hearer. In Alston's opinion these conditions are not satisfied. It is most unlikely, he says, that upon uttering a certain sentence the speaker could identify distinguishable ideas in his mind corresponding to each word of the sentence. What idea would he conjure up corresponding to 'if', 'when',

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23. For a full statement of this theory see J. Locke in the passage immediately preceding the sentence quoted above.

24. W.P. Alston op. cit. p.23.

or 'the'? Even if he could do so, could he then identify and produce that same idea apart from the word? The problem of course lies in our failure to identify the existence of a thought or idea out of context. But for the ideational theory to be successful, the presence or absence of an idea must be decidable independent of determining in what sense a word is being used. Even words such as 'dog', with an obvious connection with mental imagery, pose problems. Insofar as these words do involve mental imagery, that image is by no means the same every time the word is used in the same sense.

Other linguists, however, do not regard the above problems as insurmountable. In fact it would seem that the present fashion among linguists, in a movement led by N. Chomsky, is to adopt 'mentalism' in preference to more contextual theories of meaning.<sup>25</sup> Our access to the 'facts of language', they believe, is through intuition. Chomsky's justification for rejecting the objectivity criterion provided by contextual theories is that it has got linguists nowhere near an adequate linguistic theory or description of language. Linguistics is still far from achieving a scientific status comparable to physics or chemistry. Therefore,

"... at the present stage of the study of language, it seems rather obvious that the attempt to gain some insight into the range of data we now have is likely to be far more fruitful than the attempt to make this data more firm, e.g. by tests of synonymy, grammaticality, and the like. Operational criteria for these notions, were they available and correct, might soothe the scientific conscience; but

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25. See G. Leech, 'Semantics', p.81.

how, in fact, would they advance our understanding of the nature of language . . . " <sup>26</sup>

It should be noted however, that resort to intuition does not mean resort to pure subjectivism. <sup>27</sup> Linguists see the need to control their resort to intuition and even to support intuitive analyses by objective evidence. <sup>28</sup> Nor does it mean that the semanticists will continue indefinitely to base their analyses on a priori knowledge. <sup>29</sup> But while they continue to make progress on the basis of resting validation on intuition conceptual semanticists call for a "willing suspension of disbelief." <sup>30</sup>

## V. CONTEXTUAL THEORIES OF MEANING

From about 1930 to 1960 linguists gave pre-eminence to the empirical or observational aspect of meaning investigation. This resulted in an attempt to base meaning on context. Meaning as discussed in terms of ideas or concepts remained scientifically unobservable. In 1930 J.R. Firth wrote:

" . . . if we regard language as 'expressive' or 'communicative' we imply that it is an instrument of inner mental states. And as we know so little of inner mental states, even by the most careful introspection, the language problem becomes more mysterious the more we try to explain it by referring it to inner mental

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26. N. Chomsky, 'Current Issues in Linguistic Theory', p.81. For fuller discussion of Chomsky's theory see G.Leech, 'Semantics', p. 81 onwards.  
 27. G. Leech, 'Semantics', pp. 83-4.  
 28. See for example the approach of G. Leech, *ibid.* p.84.  
 29. *Ibid.* p. 83.  
 30. *Ibid.* p. 94.

happenings which are not observable. By regarding words as acts, events, habits, we limit our inquiry to what is objective in the group or life or our fellows." <sup>31</sup>

And so the study of meaning came to be based in terms of situation, use and context. Emphasis was put on the 'system' of language. 'Language in action' and 'meaning as use' might be taken as twin slogans for this school of thought. <sup>32</sup>

Linguists drew their support for contextualism from several fields including anthropology, philosophy and psychology. Leonard Bloomfield's behavioural theory of language was based on the latter discipline. "The meaning of a linguistic form", he says, is "the situation in which the speaker utters it and the response which it calls forth from the hearer". <sup>33</sup> Of course, "we must discriminate between the non-distinctive features of the situation . . . and the distinctive, or linguistic meaning (the semantic features) which are common to all the situations that call forth the utterance of the linguistic form." <sup>34</sup>

Bloomfield's theory thus requires that there exist features common and peculiar to all the situations in which a given expression is uttered in a given sense. There must also be features common and peculiar to all the responses made to the utterance of a given expression in a given sense. <sup>35</sup> In practice, however, it is impossible

31. J.R. Firth, 'Speech', repr. in 'The Tongues of Men and Speech' (1964) p. 173.

32. G. Leech, 'Semantics', p. 71.

33. Bloomfield, 'Language' (1935), p. 139.

34. Ibid. p.141.

35. W.P. Alston, op. cit. p. 26.

to identify features common to all utterances of a word or sentence that give that particular word or sentence its meaning. Similarly, it would be extremely difficult to find features common to the overt responses to the utterance such that its meaning can be ascertained. The utterance of an imperative is perhaps the most likely case to call forth a uniform response from the hearer. But even here the standard compliance will often not be forthcoming in practice. A standard response would be even more difficult to ascertain when the utterance takes the form of an assertion.

A more sophisticated behavioural approach was devised by the philosopher Charles Morris. His theory tended to concentrate on the responses to linguistic utterances and say little of the situation in which the utterance was spoken. It attempted to define meaning in terms of a disposition to respond.<sup>36</sup> However it would seem that in many cases no such relevant disposition is in fact discernable. The statement "Mozart wrote 'Idomenco' at the age of twenty-five" produces no semantically important disposition in the mind of the hearer.<sup>37</sup>

Contextualism in its crudest form, i.e. meaning equals observable context is incapable of dealing with anything but the simplest cases of language use.<sup>38</sup> In most cases the observable context will tell us little about meaning. Speech may occur in the absence of the

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36. See C. Morris, 'Signs, Language and Behaviour', especially Chapter 1.

37. W.P. Alston, op. cit. p. 30 For full discussion of criticisms see Alston, pp. 29-30.

38. G. Leech, op. cit. p. 74.



things being talked about and anyway, many words have no observable correlate; for example words referring to states of mind. It is true that units of language somehow get their meaning through being used by people involved in various types of behaviour. The downfall of the behavioural theories is that they again oversimplify this behavioural involvement.<sup>39</sup> Verbal behaviour cannot be defined in terms of a simple stimulus/response connection.

In practice the behavioural theories resorted to a more indirect relationship between meaning and context. Whereas meanings are learned by reference to observable context, their use may be free from that context from then on.<sup>40</sup> Thus meaning is ultimately derivable from observable context. Some theories went even further in relaxing the equation of context with observable context. An extension to the contextual theories brought in linguistic context as well, or instead of, non-linguistic context.<sup>41</sup>

Ludwig Wittgenstein was another philosopher influenced by the fact that language is founded on speaking and responding to speaking and that these are things we do.<sup>42</sup> Language, in his view, was an activity. But Wittgenstein went a step further than other philosophers. To him, meaning is not simply established by observing a word's use, meaning is its use. The influence of Wittgenstein's theory has been felt most strongly since

39. W.P. Alston op. cit. p. 31.

40. G. Leech, op. cit. p. 74.

41. Ibid. p. 74.

42. H.F. Pitkin, 'Wittgenstein and Justice', p. 36.

about 1960 following the posthumous publication of his 'Philosophical Investigations' (1953)<sup>43</sup> and other works. These later works embody a completely different view of language from that expressed in his earlier 'Tractatus Logico - Philosophicus' (1921)<sup>44</sup>. The 'Tractatus' marked the culmination of Wittgenstein's first period of thought in which he favoured a referential approach to meaning. Words 'named' or 'referred' to things in the world. "A name means an object. The object is the meaning."<sup>45</sup> The function of language was to represent the world to us, to provide "a picture of reality".<sup>46</sup> Language, he argued, had one purpose only; to make true or false statements, to assert facts.<sup>47</sup>

In his later works Wittgenstein repudiated almost every feature of the views expressed in the 'Tractatus'. Sentences were not just a string of names. Rather, language involved knowing how to use words. "For a large class of cases . . . in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use."<sup>48</sup> The emphasis is on a word's function rather than its meaning. Different words perform different

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43. L. Wittgenstein, 'Philosophical Investigations' trans. by G.E.M. Anscombe, 3rd edition (New York, Macmillan 1968)

44. L. Wittgenstein, 'Tractatus Logico-Philosophicus' transl. by D.F. Pears and B.F. McGuinness (N.York, Humanities Press, 1961).

45. Ibid. para. 3,203.

46. Ibid. para. 4.01. Wittgenstein is not saying that language is a picture of things . . . he means that language depicts facts or states of affairs, such as Paris being the capital of France . . . things as such cannot be pictured in language, they can only be named. (See M. Cranston's 'Philosophy and language', p.7.)

47. See M. Cranston, 'Philosophy and Language', pp. 7-8.

48. L. Wittgenstein, 'Philosophical Investigations', para. 43.

functions. "To understand a language", he says, "means to be master of a technique."<sup>49</sup> "Language is an instrument. Its concepts are instruments."<sup>50</sup> Thus the main themes

of the 'Philosophical Investigations' can be identified

as (i) definition of meaning in terms of use.

(ii) the variety of our uses of language, and

(iii) the need to consider utterances not in isolation but in their context.<sup>51</sup>

Throughout his work Wittgenstein makes use of analogy to explain his view of language and meaning. The tool-kit simile emphasises the variety of uses of words:

"Think of tools in a tool kit, there is a hammer, pliers, a saw, a screw-driver, a rule, a glue pot, glue, nails and screws. The function of words are as diverse as the functions of these objects." <sup>52</sup>

Different words like different tools are used in different ways. Just as there is no one use which is the essential use of all tools, so there is no one use which is common to all words and sentences.<sup>53</sup> What is more, although

not every tool can be used for every purpose, many can be used for a variety of purposes.<sup>54</sup> Similarly, words

can be compared with pieces in a game. Both have specific functions to perform. While the function of some words (usually nouns) might be to label or 'name' things, it is wrong to suppose that all words perform this function.

As H.F. Pitkin says in her book 'Wittgenstein and Justice':

49. Ibid. para 199

50. Ibid. para 569.

51. C.W.K. Mundle 'A Critique of Linguistic Philosophy, p.188.

52. L. Wittgenstein, 'Philosophical Investigations, para 11.

53. M. Cranston, 'Philosophy and Language', p. 39.

54. H.F. Pitkin, op. cit. p. 36.

"It is not that we never refer or describe, never make true or false assertions, never use words as labels. But these functions are not privileged or definitive. Just so, one can think of a label as a kind of tool, and we might keep some labels in our tool box; but anyone trying to generalise about tools using only labels as his example would be badly misled. . ."55

To know what an expression means is simply to know how it may or may not be employed.<sup>56</sup> Thus the 'meanings' of words are generated by, changed by and given content by their use in various cases.<sup>57</sup> This does not mean that words cannot be defined. But any definitions we give will be based on, and secondary to, cases of a word's use. The definition must not be allowed, indeed will not be able, to stultify the "creative openness"<sup>58</sup> of ordinary language. Of course some words may be given rigid limits in the form of technical meanings, in the same way that mathematical terms have rigid limits. But this is not an ordinary use of language. "We do not know the boundaries (of ordinary concepts)", says Wittgenstein, "because none have been drawn . . . we can draw a boundary - for a special purpose."<sup>59</sup> But any such boundary, i.e. definition, "will never entirely coincide with the actual usage, as this usage has no sharp boundary."<sup>60</sup> Words are projectable in the sense that they can be projected from a series of familiar paradigmatic cases into new and unprecedented ones.<sup>61</sup>

55. Ibid. p.43.

56. M. Cranston, op. cit. p. 39.

57. H.F. Pitkin op. cit. p. 60.

58. Ibid. p. 61.

59. L. Wittgenstein, 'Philosophical Investigations, para. 69.

60. L. Wittgenstein, 'Blue and Brown Books' (New York and Evanston, Harper and Row, 1964), p. 19.

61. H.F. Pitkin, op. cit. p. 62.

But words are projectable in regularised ways only.

Certain 'rules' govern a word's use. These 'rules' are sometimes referred to as linguistic "conventions", "habits" or "customs". Wittgenstein compares these language 'rules' with rules of a game. Knowing the use of a word is like knowing the functions and powers of a chessman. Unfortunately the analogy can leave us quite confused about the nature of linguistic conventions. Rules of a chess game are prescriptive and precise, but elsewhere Wittgenstein compares language 'rules' to the permissive and pliable 'rules' for using tools.<sup>62</sup> Much of the confusion results from this fusion of the tool simile and the game simile.<sup>63</sup> He assimilates using language to both these activities but without making it clear in which particular respects language is similar to each one and in which it is not. The game analogy gives rise to a further mistaken impression about language. While the rules of chess can be learnt before the game is played, this is not the case for words. These cannot be learned prior to speech.<sup>64</sup> Nevertheless the analogy is useful in that it emphasises the importance Wittgenstein places on linguistic context. Just as a chessman has no significance outside a game of chess, so Wittgenstein argues, words have no signification outside their use in a particular language-game.<sup>65</sup> Each of these language-games is subject to different 'rules'.

What then is the essential characteristic of language? If different words perform different functions

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62. C.W.K. Mundle, op. cit. p. 194.

63. Ibid. p. 194.

64. M. Cranston, op. cit. p. 39.

65. Ibid. p. 40.

what common characteristic do they all have to enable them all to be called 'language'? Wittgenstein answers that there is no one essential property common to all language (or "language-games" as he calls them). All they have in common is a series of similarities he calls "family resemblances". When different language games are compared, we find only "a complicated network of similarities overlapping and criss-crossing" as in the case of resemblances between different members of a family. We extend a concept "as in spinning a thread we twist fibre on fibre. And the strength of the thread does not reside in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres."<sup>66</sup>

Wittgenstein's theory of family resemblances has greatly influenced contemporary thinking about the philosophy of language. It is subject to an important limitation however. The theory works only if the resemblances are important resemblances. Without this limitation almost anything could be said to be related to something else.<sup>67</sup> Wittgenstein relieves us of the task of looking for some essential feature common to all language but leaves us with that of determining what are important resemblances.<sup>68</sup> He provides no guidance.

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66. L. Wittgenstein, 'Philosophical Investigations', para. 67.

67. See M. Cranston op. cit. p. 37. For example, my shirt resembles the snow on the Alps in colour, and the snow on the Alps resembles a frozen ox in temperature, and a frozen ox resembles a ton of coal in weight.

68. M. Cranston, *ibid.* p. 37.

## VI. IS RECONCILIATION POSSIBLE?

All the theories discussed reveal some truth about words and how we use them to convey meaning. But taken individually none seems to provide a comprehensive account. At one extreme emphasis is put entirely on the symbolic nature of language. Words name or refer to things. Little account is given of the relationship between these individual word-names. At the other extreme emphasis is entirely on the systematic nature of language as revealed by its use. Individual words are held to mean nothing by themselves. In all probability the answer lies somewhere between the two. Language is a "system of symbols"; both the symbolic aspect and the systematic aspect contribute to the final meaning. In general, words do refer to certain things and not to others. But the precise nature of that to which they refer cannot be determined until adequate consideration has been given to the context in which the word appears. The starting point for a consideration of meaning must always be a consideration of the entire utterance. It is now commonplace for judges to stress that interpretation must begin with a consideration of the entire Act read as a whole. Whether the relevant context also includes the statutory purpose is still a matter of dispute.

Stephen Ullman<sup>69</sup> is one writer who would agree that a middle-course can be taken between the competing theories. He does this by treating the ascertainment of

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69. S. Ullmann, 'Semantics'.

meaning as a two stage process. From this perspective the referential and contextual theories can be viewed as complements rather than alternatives.<sup>70</sup> The contextual theory makes it indisputable that the meaning of a word can be ascertained only by studying its use. "The investigator", he says, "must start by collecting an adequate sample of contexts and then approach them with an open mind, allowing the meaning or meanings to emerge from the context themselves."<sup>71</sup> Once this is done the meaning or meanings so identified can be formulated. Stage one, then, consists of the identification of meaning through its use in context and stage two, the 'referential' stage, of formulating those meanings. The distinction between the two stages, he argues, can be identified with the speech/language distinction. Ullmann's analysis of the meaning ascertainment process will be referred to again in the following chapter.

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70. Ibid. p.67.

71. Ibid. p.67.



## CHAPTER III

## CERTAINTY OF MEANING AND THE CLEAR CASE

## I. INTRODUCTION

Despite the fact that as lawyers we are predominantly concerned with the problems and uncertainties of language, few would disagree that statutory language is clear in at least some of its applications.<sup>1</sup>

"Inside, well on the inside, of the area of (a word's) meaning there will be little or no doubt or obscurity or even disagreement." <sup>2</sup>

Without such certainty communication as we know it would break down. In law, certainty about the rule of law to be applied gives rise to the 'clear' case.<sup>3</sup> In such a case, two necessary conditions must be met. The first concerns 'interpretation' of the rule. There must be a pre-existing rule which can be accurately discovered by the appropriate judicial methods. The form of words that symbolise the rule must be agreed upon and the meaning of those words must be commonly understood.<sup>4</sup> The second condition relates to the 'application' stage of decision-making. The facts of the case must so clearly be instances of the generalised categories embodied in the rule as to be beyond question.<sup>5</sup>

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1. R. Dickerson, 'The Interpretation and Application of Statutes', p.54.
  2. C. Curtis, 'It's Your Law', p. 62.
  3. See R.B. Seidman, 'The Judicial Process Reconsidered in the light of Role-Theories', [1969] MLR 516 at 520.
  4. Ibid. p. 520.
  5. Ibid. p. 521. The validity of the interpretation/application distinction will be discussed later.

This thesis is primarily concerned about the resolution of statutory doubt. But as "the character of a specific uncertainty of meaning is shaped, at least in part, by the relevant certainties",<sup>6</sup> it is a necessary preliminary to examine the nature of clear meaning. In particular, to examine the effect of context, including legislative purpose, on clear meaning. It will be submitted that as the meaning of a form of words can only be properly understood in light of the statutory purpose, the clear case depends on a common understanding of the full contextual meaning of the words concerned. Such a submission will have important repercussions in our later assessment of the traditional canons of interpretation.

## II. WORDS AS UNITS OF MEANING

If, as is submitted, the clear case depends upon a consideration of context, does this mean that there can be no element of certainty in individual words but only in the utterances of which those words form a part? Or is certainty as to the meaning of an utterance still in some way dependent on an element of certainty in the individual words? As we noted in the previous chapter, answers to these questions are largely dependent upon adherence to a particular theory of meaning. An attempt will be made to clarify and, if possible, to reconcile these different points of view along similar lines to those adopted by S. Ullmann in the preceding chapter.

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6. R. Dickerson, *ibid.* p. 55.

At one extreme it is argued that "the word exists only through the context and is nothing in itself"<sup>7</sup> ("le mot n'est que par le contexte et n'est rien par lui-même.") Likewise, A. Ross claims that "individual words have no independent meaning, only a meaning abstracted from the utterances in which they occur."<sup>8</sup> Thus the word 'cat' by itself means nothing. Again we read "words are meaningless in isolation."<sup>9</sup> At the other extreme, views such as those above are described as "inaccurate" and "unrealistic".<sup>10</sup> To S. Ullmann, "while it is perfectly true . . . that words are almost always found embedded in specific contexts, there are cases when a term stands entirely by itself without any contextual support and will make sense."<sup>11</sup> Upon asking what the word 'X' means we expect, and in most cases get, a reply as to meaning without undue difficulty or hesitation. "There is no getting away from the fact", writes G. Stern,<sup>12</sup> "that single words have more or less permanent meanings, that they actually do refer to certain referents and not to others, and that this characteristic is the indispensable basis of all communication."

In the previous chapter an attempt was made to identify two distinct stages in the meaning-ascertainment process. The same distinction can be used to reconcile many of the apparent differences above. We have seen

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- 7. A. Rosetti, 'Le Mot' 2nd ed. Copenhagen-Bucharest, 1947 p. 38 (quoted and translated in S.Ullmann 'Semantics' p.48)
  - 8. A. Ross, 'On Law and Justice', (Ch.4) p.113.
  - 9. C. Allen, 'Law in the Making', p. 490(7th ed, 1964)
  - 10. S. Ullmann, 'Semantics', p. 48.
  - 11. Ibid. p.48.
  - 12. G. Stern, 'Meaning and Change of Meaning, with special Reference to the English Language', p. 85. Cited by S. Ullmann, op. cit. p. 49.

that language is a system of symbols whose significance we deduce from the 'rules' governing their use. These 'rules' arise through the habitual use of particular symbols in particular ways. To determine meaning we must study the linguistic habits of the members of a particular speech community. This initial determination of the acceptability of using words in a particular way we called stage one. Viewed in relation to this initial stage, a word certainly has no intrinsic or independent meaning. Its only meaning is abstracted from the utterances in which it occurs.

Stage two of this process is described by Ross himself:

"The context will show the reference with which each word has been used in each individual case. If each individual reference is then noted, there will emerge a field of reference corresponding to the word." 13

This semantic reference he describes as having a "solid central zone where its application is prevalent and certain" and a "nebulous outer circle of uncertainty where its application is less usual, gradually becoming more doubtful whether the word can be applied or not."<sup>14</sup> These "zones" of a word's reference are of course its 'core' and 'penumbra', the subject of debate below.

Having so stated the case, can Ross then deny that the "solid central zone" constitutes in some sense a word's meaning? Is this not the very concept of word

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13. A. Ross, *ibid.* p. 114.

14. *Ibid.* p. 114.

meaning held by writers who insist that single words do have a more or less permanent meaning, and that they do refer to certain referents and not to others? Clarity of meaning arises from consistent and regular patterns of usage, originally arising from particular uses but persisting even beyond them.<sup>15</sup> J. Dewey<sup>16</sup> describes this as "potential" meaning:

" . . . all familiar words carry some meaning even when uttered in isolation . . . Their meaning is potential rather than actual until they are linked to other words. If the words 'sun', 'parabola', 'Julius Caesar', etc., are uttered, a line of directions is given to observation or discourse. But the objective of the direction is indeterminate until it is distinguished from alternative possible terminations, and is thus identified by means of relation to another term."

Thus, context operates at two levels. Not only does it lead to the eventual formulation of a word's 'standard instance', it also operates to determine the scope of both vague and general words and to resolve ambiguities. It is impossible to say with certainty whether a particular referent falls within the permissible scope of a word when no regard is had for context. This is not to deny that a word has meaning of sorts (as Ross would deny that the word 'cat' in isolation has meaning.) It is simply to say that the precise meaning of a particular word is determined by reference to context. To say that context clarifies meaning is quite different from saying that it alone gives meaning. Ross's statement that "individual words have no independent meaning"

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15. R. Dickerson, *ibid.* p. 59.

16. J. Dewey, 'Logic: The Theory of Inquiry', p. 349, (1938) Emphasis is original.

can be viewed from a new perspective. 'Independent' is the key word. Individual words do have meaning in the sense that their field of reference has a central core of certainty. But inasmuch as these words may be ambiguous, overgeneral or vague, we can never give a sufficient definition to cover all possible contingencies without reference to context. In context a word's meaning is refined by the other words around it. Language is a system of symbols, each symbol dependent to some extent on the others. The meaning of an utterance is more than the sum total of the meanings of the individual words making up that utterance.<sup>17</sup> The starting point of all interpretation must be a consideration of the whole utterance in its context. But it must also be borne in mind that the meaning of the utterance is to some extent dependent on an element of certainty in the individual words.

### III. 'CLEAR' MEANING AND CONTEXT

The most obvious way in which context clarifies meaning is through the resolution of ambiguity and the determination of 'borderline' cases. Less obvious, but equally important, is the influence of context on the standard instance or 'core' of meaning. The following debate between H.L.A. Hart<sup>18</sup> and L.L. Fuller<sup>19</sup> investigates

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17. A. Ross, op. cit. p. 113.

18. H.L.A. Hart, 'Positivism and the Separation of Law and Morals', 71 Harv. L.R. 593.

19. L.L. Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' 71 Harv. L.R. 630.

the extent of this influence in a specifically legal setting.

Hart begins the debate with his paper 'Positivism and the Separation of Law and Morals'. The distinction between core and penumbra is introduced as part of his general thesis that the law "that is" can be separated from the law "that ought to be". In essence Hart argues that all general words have some settled core of meaning, some standard instance in which no doubts are felt about the word's application.<sup>20</sup> This core meaning is impervious to the influence of context, including for present purposes the influence of legislative purpose. Without this element of certainty, argues Hart, communication as we know it would be impossible.<sup>21</sup> The operation of core meaning is illustrated by the following situation:

"A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? . . . If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behaviour be regulated by rules, then the general words we use - like 'vehicle' in the case I consider - must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out." 22

Such "penumbral" cases will each have some features in common with the standard case, but will lack others or be accompanied by features not present in the

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20. H.L.A. Hart *ibid.* p.607.

21. *Ibid.* p.607.

22. *Ibid.* p. 607.

"core".<sup>23</sup> The decision as to whether or not a particular case comes within the scope of a given word is a creative one largely dependent on context. The decision has nothing to do with logical deduction.<sup>24</sup> As Hart puts it:

"Fact situations do not await us neatly labelled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in that decision." <sup>25</sup>

Fuller criticises Hart's thesis on a number of grounds. Firstly he criticises his emphasis on individual word meanings. Problems of interpretation, Fuller argues, do not involve an ascertainment of the meanings of individual words but of entire sentences, paragraphs or whole pages of text.<sup>26</sup> He argues:

"Surely a paragraph does not have a 'standard instance' that remains constant whatever the context in which it appears. If a statute seems to have a kind of 'core meaning' that we can apply without a too precise inquiry into its exact purpose, this is because we can see that, however one might formulate the precise objective of the statute, this case would still come within it," <sup>27</sup>

Basically, the dispute is between two opposing views of the nature of meaning; between an essentially word-by-word approach and a contextual approach. In Fuller's opinion, Hart's theory fails to recognise the systematic quality of language. This system is reflected in the meaning of every statutory term.<sup>28</sup> But even if

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23. Ibid. p. 607.

24. Ibid. p. 608.

25. Ibid. p. 607.

26. L.L. Fuller Ibid. p. 663.

27. Ibid. p. 663.

28. Ibid. p. 669.



Fuller could accept Hart's word-by-word approach, he would not accept his analysis of core meaning. In particular he denies that the core is settled and complete, impervious to the influence of context. A word cannot be interpreted without knowledge of the legislative purpose. Attacking Hart's analysis of a rule forbidding 'vehicles' in a park, he argues as follows:

"In his illustration of the 'vehicle', although he tells us this word has a core of meaning that in all contexts defines unequivocally a range of objects embraced by it, he never tells us what these objects might be. If the rule excluding vehicles from parks seems easy to apply in some cases, I submit this is because we can see clearly enough what the rule 'is aiming at in general' so that we know there is no need to worry about the difference between Fords and Cadillacs. If in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose. It is rather because, for example, whether the rule be intended to preserve quiet in the park or to save carefree strollers from injury, we know, 'without thinking', that a noisy automobile must be excluded.

What would Professor Hart say if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eye-sore, support their stand by the 'no vehicle' rule? Does this truck, in perfect working order, fall within the core or the penumbra?" 29

To illustrate his point further Fuller adopts another example; that of a rule forbidding persons to sleep in railway stations. The purpose of the rule is obvious. So too is the type of situation at which it is aimed. "We are likely at once", says Fuller, "to call to mind the picture of a dishevelled tramp, spread out

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29. Ibid. p. 663.

in an ungainly fashion on one of the benches of the station, keeping weary passengers on their feet and filling their ears with raucous and alcoholic snores."<sup>30</sup> This is the 'obvious instance' of the statute, but is nowhere near the 'standard instance' of physiological sleep. The purpose of the rule reveals what cases should come within its ambit. Fuller continues:

"Suppose I am a judge, and that two men are brought before me for violating this statute. The first is a passenger who was waiting at 3 a.m. for a delayed train. When he was arrested he was sitting upright in an orderly fashion, but was heard by the arresting officer to be gently snoring. The second is a man who had brought a blanket and a pillow to the station and had obviously settled himself down for the night. He was arrested, however, before he had a chance to go to sleep. Which of these cases presents the 'standard instance of the word 'sleep'? If I disregard that question, and decide to fine the second man and set free the first, have I violated a duty of fidelity to law? Have I violated the duty if I interpret 'sleep' as used in this statute to mean something like 'to spread oneself out on a bench or floor to spend the night, or as if to spend the night'?"<sup>31</sup>

Fuller is quite correct that a word's 'core' can only be understood properly in light of the context in which the word appears. Indeed, one of the major functions of context is to limit otherwise over-general language.<sup>32</sup> This has important consequences for our conception of 'clear' meaning. If linguistic certainty is to be found in the 'core' or 'standard instance' of a word, and this 'core' is itself subject to the influence of context, then how can we justify any approach to

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30. Ibid. p. 664.

31. Ibid. p. 664.

32. R. Dickerson, Ibid. p. 65.

interpretation which has no resort to context (including statutory purpose) if the disputed terms by themselves are considered 'clear and unambiguous'?

Fuller goes further than simply emphasising the importance of context. He denies the existence of core meaning altogether. The word 'improvement', in an incomplete sentence, "is almost as devoid of meaning as the symbol 'X'", he says.<sup>33</sup> This conclusion is questionable in light of preceding discussion. To say a word has a 'core' meaning is quite consistent with that word having more than one sense. Where these senses are related the 'core' meaning would attach to the common general referent. Where unrelated, it would consist of the aggregate of 'core' meanings of the separate senses.<sup>34</sup> Thus the core meaning of a word out of context has been likened to a quiver of individually unique arrows each of which shares some element of similarity with one or more of the others.<sup>35</sup>

While denying the existence of an element of certainty in individual words, Fuller admits that he can sometimes see without thinking what a rule "is aiming at in general".<sup>36</sup> But is this certainty as to purpose unrelated to some element of certainty in the individual words?<sup>37</sup> Insofar as purpose is revealed by the enacted

33. Ibid. p. 665.

34. See R. Dickerson, Ibid. p. 61.

35. R. Dickerson, ibid. pp. 61-62.

36. L.L. Fuller, ibid. p. 663.

37. R. Dickerson, ibid. p. 58.

words it can only be as certain as those words.

Similarly, where purpose is revealed other than by the enacted words, those words cannot be extended further than their 'rules of usage' permit. Some notion of standard instance is implicit in the assumption that there is a practical limit to the meaning a word is capable of bearing.<sup>38</sup>

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38. R. Dickerson, *ibid.* p. 63.

## CHAPTER IV

## UNCERTAINTY OF MEANING AND THE PROBLEM CASE

## I. INTRODUCTION

"Lawyers have been telling each other for so many years that language of the law is precise that they have come to believe it, even though long preoccupation with litigation caused by their language should by this time have made them at least sceptical . . . " 1

As Mellinkoff recognises, statutory language will always be susceptible to the limitations and deficiencies of language in general. In addition it will be subject to the draftsman's technique and to the influence of parliamentary procedure. The present chapter is concerned with drafting only insofar as it is capable of reducing statutory uncertainty. The opposing pressures to which the draftsman is subject, i.e. brevity and precision, will of course greatly influence his or her effectiveness in producing a clear and unambiguous text. As far as parliamentary procedure is concerned, let it suffice to note that text validation can sometimes lead to distortion of the legislative text thereby creating undue uncertainty.<sup>2</sup> The main concern of this chapter is to investigate the primary sources of linguistic uncertainty. <sup>The</sup> Discussion will be divided <sup>into</sup> under three <sup>parts</sup> headings; ambiguity, vagueness and generality. Each will be discussed in terms of

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1. D. Mellinkoff, 'The Language of the Law', p. 290.
  2. For further discussion of uncertainty caused by text validation and drafting techniques see F. Bennion, 'Statute Law', Chapters 11-14 and Chapters 16, 17 and 18 on drafting errors.

its potential for giving rise to a problem case of interpretation.<sup>3</sup>

Such a case arises because either of the two conditions necessary for a clear case are missing.<sup>4</sup>

Firstly, there may be disagreement about the formulation of the rule, either with respect to the form of words to be used or the meaning of those words. Secondly, even if the rule and its meaning are agreed, the particular facts may arguably, but not necessarily, fall within its terms. In such a case the court exercises a creative role.<sup>5</sup> Where no clear rule is applicable, it must determine what the appropriate form and content of the rule is to be. Where the facts of the case before it do not clearly fall within the terms of the rule it must decide whether or not to extend the operation of the rule to those facts. In effect, the court redefines the rule, clarifying its future operation with respect to similar cases. It should be noted, that there is no clear dividing line between clear and problem cases. As N. MacCormick puts it:<sup>6</sup>

"There is a spectrum (of cases) which ranges from the obviously simple to the highly contestable, and across that spectrum it could never be judged more than vaguely at what point some doubt as to the 'relevancy' or 'interpretation' or 'classification' could be raised . . . " <sup>7</sup>

Differences of judicial style, approach and even

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3. Also called a 'hard' case: see N. MacCormick, 'Legal Reasoning and Legal Theory', p. 195.

4. See R.B. Seidman op. cit. p. 521 and discussion on p.31 above concerning the clear case.

5. R.B. Seidman, Ibid. p. 521.

6. op. cit.

7. Ibid. p. 198.

temperament<sup>8</sup> range alongside the nature of language itself as reasons for this vagueness.

## II. AMBIGUITY

The type of linguistic uncertainty which most readily springs to mind is probably ambiguity. Ambiguous expressions are defined by the Oxford Dictionary as being those capable of more than one meaning. For present purposes we shall treat this as including words or phrases with potential for giving rise to uncertainty. Ambiguity may arise in a number of ways and may take one of a number of different forms. We shall call these 'lexical',<sup>9</sup> 'syntactic' and 'contextual' ambiguities.

While we shall be including in our discussion words and phrases with a potential for giving rise to uncertainty, a distinction must be made between potential, apparent and actual ambiguity.<sup>10</sup> The lexical and syntactic ambiguities we will look at are characterised as such by their potential for giving rise to uncertainty. Once placed in a specific context the intended meaning may become clear. An actual ambiguity exists where the admissible context as a whole does not resolve the uncertainty. The legislative draftsman must seek to avoid all ambiguities that will not be resolved by the admissible

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8. Ibid. p. 198.

9. This form of ambiguity is sometimes also described as 'semantic ambiguity'. See, for example, R. Dickerson, *ibid.* p.46. Used in this way the word 'semantic' is obviously used in its most narrow sense.

10. See R. Dickerson, 'The Interpretation and Application of Statutes.'

context. Where possible he must also avoid the use of apparent ambiguity. At best the resolution of such ambiguous words and phrases involves unnecessary time and expense.<sup>11</sup>

### (1) Lexical Ambiguity

Perhaps the most obvious form of ambiguity is that where the uncertainty is due to factors relating to the signification and application of individual words. In numerous cases more than one sense is connected with the same name. This linguistic feature is commented upon by Glanville Williams who noted a "most remarkable maldistribution of words, a great unevenness of density; for some ideas are expressible in a dozen different words and others have to be lumped together under one."<sup>12</sup>

Lexical ambiguity may be sub-divided into two separate (but not always distinct) categories. These categories warrant separate discussion due to their differing potential for confusion once placed in context.

(a) Polysemy. 'Polysemy' arises when one word has many senses regularly attaching to it.<sup>13</sup> Words such as 'get', 'make' and 'put' need lengthy dictionary entries to cover the wide variety of senses they cover. Take for instance the verb 'to make'. Inter alia this can mean 'to construct', 'to compose', 'to prepare', 'to result in', 'to establish', 'to enact', 'to gain'.

Not all agree on whether this multiplicity of senses is in fact a defect of language. Some regard it

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11. Ibid. p. 48.

12. G. Williams, 'Language and the Law', 61 LQR 71 at 179.

13. M. Black, 'Labyrinth of Language', p. 171.



as an essential condition of its efficiency.<sup>14</sup> The answer depends on the extent to which context clarifies the intended meaning of a polysemous word. If only one sense is appropriate in a given context then no problem arises and polysemy could certainly be regarded as "an invaluable factor of economy and flexibility in language."<sup>15</sup> If, on the other hand, context fails to indicate the intended sense, then a true equivocation exists. To a lawyer this can only be regarded as a defect.

A good example of the undesirable use of polysemy is provided by the word 'residence' as it occurs in the sentence "his rights depend on his residence".<sup>16</sup> The immediate context fails to indicate which of the two alternative senses of the word 'residence' is intended. Is it the place where a person has his abode for an extended period, or the place that the law considers to be his permanent home, whether or not it is his place of abode? Of course it is possible that reference to a wider context may resolve this uncertainty. But as we shall see evidence of extended context, even though relevant, is not always admissible as evidence. Having adopted this narrow attitude towards context, we must regard all but a few polysemous words as potentially capable of producing confusion or misunderstanding. The example above illustrates a further example of ambiguity. The

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14. See for example the attitude of S. Ullmann in 'Semantics' p. 168 and compare it with that of R. Dickerson in 'The Interpretation and Application of Statutes' p.44. Note that while one deals with the general topic of semantics the other is specifically concerned with legislative uncertainty.

15. S. Ullmann *ibid.* p. 168.

16. See R. Dickerson, *op. cit.* p. 44.

concept of a 'right' is fundamental to our legal system. But despite attempts by Hohfield to distinguish between the several different concepts expressed by this word, its use is often totally indiscriminate.

On the whole lawyers recognise the dangers arising from such ambiguity. They have taken pains in their attempt to construct and preserve a moderately precise technical language.<sup>17</sup> The success of these efforts has been limited. It is interesting to speculate whether this quest for a legal language devoid of all ambiguity could ever be entirely successful. It is our most commonly used words that have the widest range of meanings. Research has in fact shown a direct relationship between the frequency of occurrence of a word and the number of different senses it is likely to have.<sup>18</sup> Lawyers may search for a more precise form of legal expression by use of technical words but they could never eliminate the English language altogether.

(b) Homonymy. 'Homonymy' arises when one and the same word-sound has two quite distinct meanings.<sup>19</sup> Examples are words such as 'seal', name of an animal, and 'seal', piece of wax fixed on a letter; 'bore', tiresome person, and 'bore', diameter of a gun barrel.

Of these two forms of ambiguity polysemy is by far the more widespread. This does not mean that homonyms

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17. G. Williams, op. cit. at p.79.

18. See discussion of research by G.K. Zipf and J. Whatmough in S. Ullmann, 'Semantics', p. 169.

19. M. Black, op. cit. p. 171.

occur only infrequently in the English language. However, unlike polysemy, the vast majority of cases involving homonyms cause no embarrassment or confusion in practice. The intended sense of a homonymous word in most cases is revealed by use. Thus context provides the prime safeguard against confusion.<sup>20</sup> For this reason lawyers are rarely concerned with homonymy as a form of ambiguity. In his discussion of semantic ambiguities,<sup>21</sup> Dickerson goes so far as to actually distinguish between homonymous words and ambiguous words. The difference is one of definition only. Whereas the present discussion includes words with a potential for giving rise to uncertainty, Dickerson limits his discussion to words which in practice give rise to uncertainty. In his opinion, "the homonym's capacity for sense shifting is built in and automatic."<sup>22</sup> Surely by this he means that once employed in context we automatically know what meaning is intended by a homonymous word. In fact "we do not even have to exclude the other meanings of the word: these meanings do not arise for us, they do not cross the threshold of our consciousness."<sup>23</sup> Since this is the case with the great majority of homonymous words this particular form of ambiguity presents no significant danger to clear legal expression and will receive only brief mention.

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20. The intended meaning of a homonymous word is in most cases revealed by its immediate context.

21. R. Dickerson, op. cit. p. 46. Note that by 'semantic ambiguity' he refers to what we have called 'lexical' ambiguity.

22. Ibid. p. 44.

23. Bréal, 'Essai de sémantique. Science des significations' (5th ed., Paris, 1921), p. 145. Transl. in S. Ullmann, op. cit. p. 168.

## (2) Syntactic Ambiguity

Syntactic ambiguities are uncertainties of modification or reference within the particular statute.<sup>24</sup> Unlike lexical ambiguity which arises from the range of meanings of individual words, syntactic ambiguity arises from the actual use of words in sentences. The uncertainty concerns the relationship between the different words in a sentence.<sup>25</sup> The present discussion is not intended to be a comprehensive account of syntactic ambiguity, but will be limited to an illustration of some of the problems that may arise.

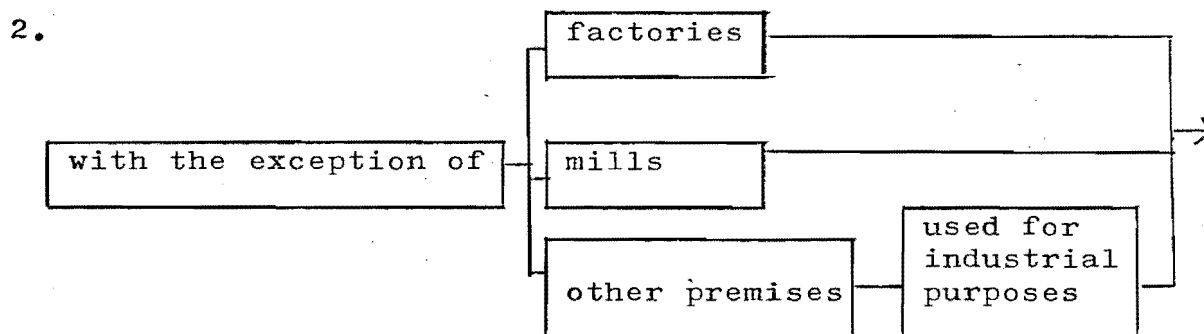
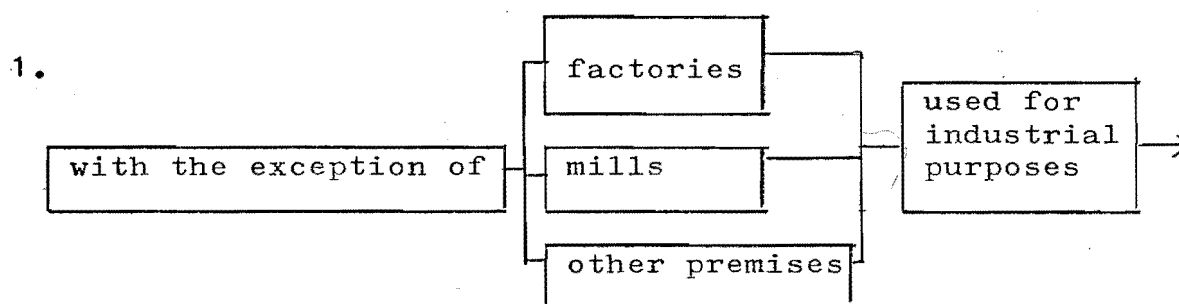
An obvious source of ambiguity is the use of a modifier in a conjoint sentence. The question is, does the modifier qualify one or more of the several limbs of the sentence? In some cases no real problem arises for the interpreter. Some meanings are clearly more reasonable than others. The meaning of the sentence 'Young men and women who attained the necessary qualifications are eligible' is reasonably clear. But in other cases more serious doubts can arise. In the sentence 'charitable corporations or institutions performing educational functions' two interpretative problems arise; does 'charitable' modify 'institutions' as well as 'corporations', and does 'performing educational functions' modify 'corporations'? Another source of ambiguity is the use of squinting modifiers. In the sentence 'the trustee shall require him promptly to repay the loan' does 'promptly' modify 'require' or 'repay'?

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24. R. Dickerson, op. cit. p. 46.

25. J.L. Montrose 'Syntactic (Formerly Amphibolous) Ambiguity', M.U.L.L. June 1962. p. 65.

The above examples can be made more explicit by the use of diagrams.<sup>26</sup> Depending on the nature of the ambiguity either a circuit diagram or an isomer diagram will be appropriate. For example in Crowe v. Lloyd's British Testing Co.<sup>27</sup> confusion arose about the definition of non-industrial buildings in the U.K. Rating Act 1957. Section 22(4) referred to "buildings of any description with the exception of factories, mills and other premises of a similar character, used wholly or mainly for industrial purposes." The alternative meanings are made clear by the following circuit diagram:



The court's decision was in favour of (1).

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26. See J.L. Montrose op. cit. for full discussion of the diagrammatic explanation of syntactic ambiguity.

The above examples are taken from this article.

27. [1960] 1 All E.R. 411.

And in Re Watertube Boilermakers Association<sup>28</sup>

the U.K. Restrictive Trade Practices Act 1956 Section 21(1)(f) provided that a restriction is valid if "the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry."

The ambiguity differs in syntactic function from that above and cannot be explained by means of a circuit diagram. J.L. Montrose<sup>29</sup> draws an analogy from the description of chemical compounds and clarifies the ambiguity by the following isomer diagrams:

1.  $\left[ \begin{array}{l} \text{(reduction) --- (which is} \\ \text{substantial---)} \end{array} \right] \text{ (in the volume} \\ \text{---of the business)}$

2.  $\text{(reduction) ---} \left[ \begin{array}{l} \text{(in the volume (which is} \\ \text{of the business)- substantial)} \end{array} \right]$

The court's decision favoured (1).

Although the above diagrams clarify the nature of the ambiguity, they do not resolve it. In devising their solution the judges will not be guided solely by rules of grammar. In fact it is doubtful whether there are any relevant rules of grammar.<sup>30</sup> Syntactic connective forms have no unequivocal function.<sup>31</sup> Context,

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28. [1959] 3 All E.R. 257.

29. op. cit. p. 67.

30. Ibid. p. 69.

31. A. Ross, 'On Law and Justice', p. 127.

statutory purpose and judicial policy must remain the principal guiding factors in a decision.

In conclusion it is interesting to note the comments of A. Ross<sup>32</sup> that reference to a 'clear or unambiguous' statutory text can only properly refer to its syntactic interpretation. As far as individual word meanings go, the text will always be subject to the indeterminacy of vagueness,<sup>33</sup> and can never be entirely 'clear or unambiguous'. This would certainly appear to be true of a word taken in isolation. It is however consistent with Ross's theme and with this thesis that, considered in context (including statutory purpose), an expression may clearly be intended to cover the relevant fact situation.

### (3) Contextual Ambiguity

Contextual ambiguities are those concerning the relationship of one utterance to others within a context.<sup>34</sup> A. Ross calls this "logical ambiguity", not because it can be solved with the aid of logic or mechanical principles of interpretation, but because it is ascertained by a logical analysis of the substance of the statute.<sup>35</sup> Contextual ambiguities can be internal or external; that is, a provision can bear an ambiguous relationship to another provision within the same statute or with another statute. The uncertainty can arise for a number of reasons. Dickerson suggests that

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32. Ibid. p. 128.

33. see pp. 57-69.

34. A. Ross, op. cit. p.128.

35. Ibid. p. 134.

the most troublesome contextual ambiguity, and perhaps the most frequent, is the uncertainty as to whether a particular implication arises.<sup>36</sup> It is often unclear, for example, whether the maxim 'expressio unius est exclusio alterius' applies in particular contexts so as to impose a 'negative' implication.<sup>37</sup> Inconsistency is another common source of ambiguity. Ross identifies three types of inconsistency which he calls total inconsistency (or absolute incompatibility), total-partial inconsistency (or inconsistency between the general and the particular rule) and partial inconsistency (or overlapping of rules).<sup>38</sup> The way such inconsistencies are resolved depends largely on whether they are internal or external.

Within a statute total and total-partial inconsistencies are rare.<sup>39</sup> Relationships between general and particular rules do not normally cause difficulty; if no syntactic link exists between the two, as is common in statutes, the particular rule is still viewed as a specific limitation on the general rule. This could be regarded either as a case of implied syntactic conjunction<sup>40</sup> or as an example of the operation of the maxim 'generalalia specialibus non derogant' which will be discussed shortly. On the other hand partial inconsistency will frequently occur in a statute. Such inconsistency cannot be resolved by linguistic interpretation or logical construction.<sup>41</sup> The decision rests

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36. R. Dickerson op. cit. p. 47.

37. Ibid. p. 47.

38. A. Ross, op. cit. p.129.

39. Ibid. pp. 129,130.

40. Ibid. p. 130.

41. Ibid. p. 131.



on factors other than the statutory text itself, for example, on admissible evidence of statutory purpose, or on discretion.

Inconsistencies between different statutes are sometimes resolved by application of the maxim 'generalalia specialibus non derogant' or by the doctrine of implied repeal. The principle of 'generalalia specialibus' is as follows:

" . . . Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so." <sup>42</sup>

Thus it involves the engrafting of an exception onto general words which taken in their natural signification, apart from any consideration of a more specific provision on the same subject matter, would readily extend to the matter in hand.<sup>43</sup> The second method by which inconsistencies may be resolved is by the doctrine of implied repeal; the last in time prevails.

"If . . . the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later." <sup>44</sup>

This doctrine has been described as a last resort device to be applied only if the 'generalalia specialibus' principle fails to resolve the uncertainty.<sup>45</sup>

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42. Seward v. Vera Cruz (Owners) (1884) 10 App. Cas. 59, 68.

43. Professor J.F. Burrows, 'Inconsistent Statutes' [1976] 3 Otago L.R. 601.

44. Kutner v. Phillips [1891] 2 Q.B. 267.

45. Professor J.F. Burrows, op. cit. p. 607.

Generalia specialibus is applied most often when a specific provision in one Act has preceded a general one in another Act. In this case the maxim prevails over the doctrine of implied repeal. If the specific provision is later in time than the general one the result will be the same; the specific provision will prevail and an exception will be grafted onto the general rule. But in this case, the result is due not to an application of the generalia specialibus principle, but to the doctrine of implied repeal. However, while a later specific provision will always prevail over an earlier general one, a later general provision will not always be subject to a preceding specific provision. The generalia specialibus maxim is not a rule of law and will not be unconditionally adhered to where it is clear that Parliament intended the general provision to prevail. Similarly with the doctrine of implied repeal where the inconsistency arises other than as a result of general and specific provisions. The doctrine applies only insofar as the legislature 'intended' to supersede the earlier law.<sup>46</sup> Its intention may have been to supplement the already existing law. The court will base its decision either on evidence of intention found outside the statutory text or on its own discretion.

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<sup>46</sup>. A. Ross, op. cit. p. 131.

### III. VAGUENESS

#### (1) Description and Illustration of Vagueness

Ambiguity is a relatively easy factor of semantic uncertainty of which to take account. Clarification is provided by separate specifications of the various meanings of a word or phrase and some analysis of the conditions in which one sense will be used in preference to another.<sup>47</sup> A more difficult semantic feature to deal with is vagueness.

A term is vague when there are borderline cases where there is no definite answer as to whether the term applies or not.<sup>48</sup> These are the cases which fall within a word's 'penumbra' of uncertainty or its 'fringe' of application. The word 'penumbra' is well-chosen. It is defined as a partial shade bordering on a fuller or darker one; a twilight.<sup>49</sup> The difficulties of defining the precise point at which day becomes night are known to us all.

The term 'elderly' is one subject to this type of indeterminacy. Do we apply it to a person aged 58? Aged 60? Aged 70? The fact that we can give no definite answer as to what delimits 'elderliness' is due to an aspect of the term itself. It has nothing to do with the current state of our knowledge about the conditions necessary for its application and whether or not these have been fulfilled.

47. See W.P. Alston, 'Philosophy of Language', p.84.

48. Ibid. p. 84.

49. See F. Bennion, 'Statute Law', p. 123.

"A proposition is vague when there are possible states of things concerning which it is intrinsically uncertain whether had they been contemplated by the speaker, he would have regarded them as excluded or allowed by the proposition. By intrinsically uncertain we mean not uncertain in consequence of any ignorance of the interpreter, but because the speaker's habits of language are indeterminate." 50

It has been claimed that all words whose application involves use of the senses are vague.<sup>51</sup> One can easily find borderline cases where it is uncertain if the class name applies. An obvious example is colour names. As with the illustration of twilight, defining colour provides a useful analogy to the nature of vagueness itself.

"The changes of colour in the spectrum are throughout so continuous that it is not possible to find the exact point at which the changes of direction begin." 52

A useful discussion of the nature of vagueness is provided by Max Black in his book 'Language and Philosophy'. The discussion is centred around the word 'chair', a word that applies to an incredible variety of objects.<sup>53</sup> However it is important to distinguish between the vagueness of the word 'chair' and the variety of the word's application to objects of differing size, shape and material.<sup>54</sup> The variety of application arises from its definition in terms of the

50. Peirce in Baldwin's 'Dictionary of Philosophy and Psychology' 2 (1902) p. 748.

51. M. Black, 'Language and Philosophy', p.33.

52. G.F. Stout, 'Manual of Psychology', p.160.

53. From arm chairs to settees to opera stalls. See the description of 'chair' in H.G.Wells's 'First and Last Things', p. 16.

54. See discussion of distinction between generality and vagueness in M.Black op.cit. p.31 and below pp. 60-61.

need to be satisfied. "A separate seat for one' is compatible with great variation in form. The vagueness of the word relates to the fact that borderline cases exist where the acceptability or otherwise into the class of 'chairs' is inherently doubtful.

"It is the indeterminacy of the usage, not its extension which is important for the purpose of the argument. The finite area of the field of application of the word is a sign of its generality while its vagueness is indicated by the finite area and lack of specification of its boundary." 55

Because small variations in character are unimportant in serving the purpose required by a chair, it is possible by successive small variations ultimately to produce borderline cases.<sup>56</sup>

So far we have looked at vagueness arising through the lack of a precise cut-off point. This is fairly easy to discern. A more complex source of indeterminacy can be found in the way in which some words have a number of independent conditions of application.<sup>57</sup> Where a plurality of relevant conditions exist, vagueness stems from indeterminacy as to what combination of conditions is sufficient or necessary for the application of the term. Take for example the term 'religion'.<sup>58</sup> We encounter difficulties as soon as we try to specify the characteristic features, or combination of features, which provide a sufficient condition for its application. And even if we could

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55. M. Black, *ibid.* p. 31.

56. *Ibid.* p. 31.

57. W.P. Alston, *op. cit.* p.87.

58. For full discussion of the vagueness of terms such as 'religion' see W.P. Alston, *ibid.* pp. 87-90.

say exactly which or how many of the various religion-making characteristics an entity must have to be a 'religion', could we say to exactly what degree it must possess them? W.P. Alston describes this as a 'double' vagueness.<sup>59</sup>

(2) Distinctions Between Vagueness and Other Forms of Linguistic Uncertainty

The term 'vague' is often used very loosely to apply to any kind of uncertainty of meaning. However, there is no inherent reason why the term should be so used. A clear distinction can be made between vagueness and other forms of uncertainty. By now the distinction between ambiguity and vagueness should be obvious. Yet many legal writers frequently confuse the two.<sup>60</sup> Let it suffice to say that whereas the uncertainty of ambiguity involves a central either/or choice between a finite number of distinct or related core meanings, the uncertainty of vagueness lies in marginal questions of degree.<sup>61</sup>

Further confusion exists between vagueness and generality, or what Alston calls "lack of specificity."<sup>62</sup> As an example of the latter he gives the sentence "we must take steps to meet the emergency".<sup>63</sup> This sentence may commonly be called vague. But the uncertainty lies not in the vagueness of the word 'steps', in that there

59. Ibid. pp 87-90.

60. For example, see A.S. Miller, 'Statutory Language and the Purposive Use of Ambiguity' 42 Va.L.Rev.23 (1956). Miller seems to use his terms indiscriminately. Presumably he intends to advocate vagueness rather than ambiguity as a desirable feature of legal language. Employment of vague terms leaves the court an element of discretion.

61. R. Dickerson, op.cit.p.49.

62. W.P. Alston, op.cit.p.85. 63. Ibid. p.85.

are cases where it is not clear whether something should or should not be called a 'step', but in the lack of specificity resulting from use of the general term 'steps'. Clarification would involve stating what specific steps were intended. This does not mean that the word 'steps' is not vague to some extent; it merely means that the indeterminacy in question is not due to this vagueness.

The previous example of the word 'chair' also clearly illustrates the distinction between vagueness and generality. As Black puts it:

"generality is constituted by the application of a symbol to a multiplicity of objects in the field of reference . . . likewise ambiguity is constituted by the association of a finite number of alternative meanings having the same phonetic form . . . but it is characteristic of the vague symbol that there are no alternative symbols in the language, and its vagueness is a feature of the boundary of its extension and is not constituted by the extension itself." 64

### (3) Vagueness as a Desirable Feature of Legal Language

Our first inclination might be to attempt to eliminate all vague words from statutory language. After all, vagueness, like ambiguity, gives rise to uncertainty. Unlike ambiguity, however, the uncertainty due to vagueness is often a constructive uncertainty. Quite apart from the question of whether it is possible to completely eliminate vagueness (which we will consider later), we must consider whether in fact it

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64. M. Black op. cit. p.29.

would be desirable to do so. As Wittgenstein<sup>65</sup> asks:

"Is it even always an advantage to replace an indistinct picture by a sharp one? Isn't the indistinct one often exactly what we need?"

In numerous cases the legislature wishes to maintain flexibility in a legislative provision. It could be that it realises its own inability to legislate for all possible future contingencies it would wish to be covered. Or it could be that the legislature simply considers the judiciary the best equipped body to control legal development in certain fields. F. Bennion notes the use of politic uncertainty,<sup>66</sup> For reasons noted by him Parliament may sometimes consider it politic to obscure the legislative text.

The desirability of statutory vagueness will depend on the extent to which it is believed desirable to leave the resolution of uncertainties to those who administer and enforce the statute.<sup>67</sup> By careful use of terms, the legislative draftsman should be able to control the degree of vagueness to the level required by the above considerations. Should he be unable to avoid the use of vagueness when not needed, he should at least be able to reduce it to such a degree that it will not affect the legislative purpose.<sup>68</sup> Reed Dickerson is quite correct when he describes the linguistic disease as 'over-vagueness'. For similar reasons over-precision

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65. Wittgenstein, 'Philosophical Investigations', p.71.

66. F. Bennion, 'Statute Law', p.132.

67. R. Dickerson, op.cit.p.50.

68. ibid. p.50.



will be undesirable where the legislature intends to leave a wide discretion to the courts.<sup>69</sup>

If the use of vague terms is to give rise to discretion, then vagueness must be a subjective feature of language. That is, the categorisation of the boundaries of a vague term must relate to the observer rather than being an objective feature of the term itself. With this in mind the research and opinions of Max Black<sup>70</sup> become highly relevant. Black holds the view that vagueness is an objective feature of language. It can be defined, he says, by a statistical analysis of the frequency of deviations from strict uniformity by the 'users' of a vague symbol. It is therefore possible to define a 'consistency profile'<sup>71</sup> corresponding to each vague symbol and thus to classify, or even theoretically to measure, degrees of vagueness. The fringe of any vague term could thus be located and measured.

What are the implications of Black's theory for the judges who decide cases falling within marginal areas of uncertainty? Is it of any practical use to them? Does it eliminate the exercise of their discretion? Obviously Black's analysis requires an enormous amount of time and information. While it may be possible to

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69. Ibid. p.50.

70. M. Black, op. cit. Chapter on 'Vagueness'.

71. Being based on the existence of a group of users of a language whose linguistic habits are sufficiently stable and intercorrelated to permit of limiting assertions concerning frequencies of deviation from a standard: See M. Black, ibid. pp. 42-58.

measure the limits of a word's penumbra in theory, in practice it is unlikely that this would ever be done consistently for all vague words. Black's findings are of little practical value to the judge who could never achieve the degree of objectivity required. The necessary information is simply not available. Consequently the limits of vagueness will remain the range of his own uncertainty, subjectively determined.

Of course some would deny that it is the business of a judge to consider such theoretical issues at all. As Chitty, J. has said:<sup>72</sup>

"Courts of Justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say 'This is a horse's tail' at some time".

However, any decision as to whether a particular fact situation falls within the scope of a vague word involves some comprehension of the limits of that vagueness. Even if it be unconscious, a judge must first have some idea of the extent of a word's permissible range of meaning.

(4) Is Absolute Precision Possible: Definition and The Possibility of Vagueness

Lawyers are obsessed with the need for precision. In statute law this is one of the draftsman's prime objectives. We have seen that by careful drafting ambiguous words can be avoided. So too can over-general words. In theory vagueness can be reduced to a point where it does not affect the legislative purpose.

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72. Lavery v. Pursell (1888) 39 Ch.D. 508 at 517.

But can it be avoided altogether and absolute precision obtained? It would seem not.

In attempting to make a statute as precise as possible we may redefine a term. But quite often the terms employed to remove the vagueness are themselves vague, though perhaps to a lesser degree and/or in different respects.<sup>73</sup> Alston gives as an example the attempt to remove the vagueness of the word 'city',<sup>74</sup> By stipulating that a community is a 'city' if, and only if, it has at least 50,000 inhabitants we remove the indeterminacy as to the minimum number of inhabitants required. But what of the term 'inhabitant'? When is a person to be counted as an inhabitant of a community? What of the person who owns a residence in the community that he occupies only during the summer, renting it out and living elsewhere during the rest of the year? The number of doubtful 'inhabitants' is endless. Even when a decision is made as to just what conditions are necessary and sufficient for application of the term, no doubt these conditions would themselves be vague in some respect or other.

It would be wrong to suppose that we are making no progress in clarifying the example above, but merely replacing one vagueness with another. By removing one element of vagueness we have not introduced any new vagueness. Rather we have made visible other vaguenesses that were there all along. It is not until we remove the more obvious vagueness, for example the indeterminacy

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73. W.P. Alston op. cit. p.90.

74. Ibid. p.90.

as to the number of inhabitants, that we become aware of the problem of defining the inhabitants themselves.<sup>75</sup>

As long as we seek precision by means of defining conditions of application, we will repeatedly end up with terms that are themselves vague. What then if we adopted a more scientific approach and replaced qualitative terms with quantitative ones? As we have seen from the above example our problems are by no means eliminated. The introduction of a quantitative limit did not remove all vagueness. There still existed the problem of identifying the units to be counted. The application of any term of measurement will exhibit whatever vagueness attaches to the term used to describe the thing being measured. Even the description of such things as length, temperature, weight and size<sup>76</sup> by means of quantification fails to achieve absolute precision.<sup>77</sup> For example 'a large park' could be defined as 'a park containing 20,000 square feet'. Disregarding for a moment the problems of defining 'park', the description of its size is still not absolutely precise. Any measurement will be subject to a margin of error. The indeterminacy of vagueness is not peculiar to everyday language but is also present in all scientific measurement.<sup>78</sup>

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75. Ibid. p.91.

76. particular instances of which are positions along a continuum.

77. W.P. Alston, op.cit.p.92.

78. M. Black op.cit.p.27. Cf this with W.P. Alston, ibid. p.93, who argues that the margin of error in measurement is an indeterminacy due to the inherent limitations on our powers of measurement i.e. due to insufficiency in the data rather than to a semantic feature of the terms used. Thus he thinks it best not to treat this margin of error as a kind of vagueness.

Quite apart from the difficulties discussed above, all definition of empirical terms will be subject to the possibility of vagueness. Friedrich Waismann has called this the 'open texture' of terms.<sup>79</sup> It arises because of the 'essential incompleteness' of all empirical description.<sup>80</sup> While the actual use of a term may not be vague, it may be of open texture in that we can never fill up all the possible gaps through which doubt may creep in. Thus the term 'gold' is not vague in the sense we understand but it is subject to the possibility of vagueness in Waismann's sense. The following passage from Waismann's paper describes this linguistic feature and the difficulties of definition to which it gives rise:

"A term is defined when the sort of situation is described in which it is to be used. Suppose for a moment that we were able to describe.. situations completely without omitting anything (as in chess), then we could produce an exhaustive list of all the circumstances in which the term is to be used so that nothing is left to doubt; in other words, we could construct a complete definition, i.e., a thought model which anticipates and settles once and for all every possible question of usage. As, in fact, we can never eliminate the possibility of some unforeseen factor emerging, we can never be quite sure that we have included in our definition everything that should be included, and thus a process of defining and refining an idea will go on without ever reaching a final stage. In other words, every definition stretches into an open horizon. Try as we may, the situation will always remain the same: no definition of an empirical term will cover all possibilities . . . " 81

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79. F. Waismann, 'Verifiability', second paper in a symposium from 'Proceedings of the Aristotelian Society' Supp. Vol.19 (1945) pp.119-50. reprinted in 'The Theory of Meaning' ed.by G.H.R.Parkinson, Oxford Readings in Philosophy.

80. F. Waismann, *ibid.* p.39.

81. *Ibid.* p. 40.

A good example is provided by Glanville Williams<sup>82</sup> of the discovery of black swans in Australia. So imbued were zoologists with the idea that whiteness was a property of swans that when black swans were discovered it was at first decided to allot them to the genus 'Chenopsis' and not 'Cygnus'. Difficulty arises when we attempt to apply general names of any sort to concrete instances. Similarities and differences abound in nature but any attempt to place static boundaries around them in the form of definitions is bound to cause problems since the non-linguistic world displays a remarkable lack of such boundaries.<sup>83</sup>

Waismann distinguishes between the open texture of empirical concepts and the closed<sup>84</sup> texture of mathematical concepts:

"If I had to describe the right hand of mine . . . I may say different things of it: I may state its size, its shape, its colour, its tissue, the chemical compound of its bones, its cells, and perhaps add some more particulars; but however far I go, I shall never reach a point where my description will be completed: logically speaking, it is always possible to extend the description by adding some detail or other . . . Contrast this case with others in which completeness is attainable. If in geometry I describe a 'triangle' e.g. by giving its three sides, the description is complete: nothing can be added to it that is not included in, or at variance with the data. Again, there is a sense in which it may be said that a melody is described completely in the musical notation (disregarding, for the moment, the question of its interpretation); a figure on a carpet, viewed as an ornament,

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82. op.cit. p.190.

83. Ibid. p.190. See discussion below concerning classification and the concept of a class. pp. 71-73.

84. F. Waismann op.cit. p.41. Waismann uses the same terminology and distinction between 'open' and 'closed' terms as Aristotle. See Aristotle's 'Categories and de Interpretatione' para. 10a. 116. translated by J.L. Ackrill.

may be described in some geometrical notation; in this case, too, there is a sense in which the description may be called complete. (I do not mean the physical carpet, but its pattern.) The same applies to a game of chess: it can be described move by move from beginning to end. Such cases serve to set off the nature of an empirical description by the contrast: there is no such thing as a completeness in the case in which I describe my right hand, or the character of a person; I can never exhaust all the details nor foresee all possible circumstances which would make me modify or retract my statement." 85

The open texture of terms leads A. Ross to conclude that there is no point in asking what a word 'really is'.<sup>86</sup> We could never give a definitive answer; no definition of meaning that we could provide would ever be absolutely watertight.

#### IV. GENERALITY

The distinction between ambiguity, vagueness and generality has already been touched upon.<sup>87</sup> A word is general when it denotes more than one referent.<sup>88</sup> This definition has obvious similarities to that of ambiguity and confusion often arises between the two. The difference is that while generality permits simultaneous reference, ambiguity permits only alternative reference.<sup>89</sup> Take, for example, the word 'grandmother'. Its generality permits reference to both maternal and paternal grandmothers, but does not necessarily result in ambiguity. Ambiguity only arises if the general word is intended to denote one referent only but the context fails to

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85. F. Waismann, *ibid.* pp. 39-40

86. A. Ross *op.cit.* p.114.

87. see pp.

88. R. Dickerson, *op.cit.* p.51.

89. *Ibid.* p.51.

indicate which one is intended. The sentence 'My grandmother is on holiday' would be ambiguous if both grandmothers were living and the context failed to reveal which one was being referred to.

Similarly, generality is often confused with vagueness. This is understandable since most general words are also vague in their application. Our discussion of the word 'chair' in the preceding section illustrates this point. Its generality arises from its capacity to simultaneously cover dentist chairs, arm chairs, even church pews. Its vagueness is illustrated by the uncertainty as to whether it also covers an old, upturned wooden box.<sup>90</sup>

Like vagueness, generality is not necessarily a defect of language. Problems arise only when the words used denote classes broader or narrower than is indicated by the statutory purpose.<sup>91</sup> The problems are thus over-generality or under-generality. Unlike vagueness and ambiguity, mere generality does not give rise to an uncertainty of meaning. Inasmuch as a court has discretion to choose between the various possible referents of a general word, its choice is based on factors other than those governing the ascertainment of meaning.<sup>92</sup>

90. See the discussion of the distinction between vagueness, ambiguity and generality in Max Black, op.cit. p.29. (quoted above at p.61.)

91. R. Dickerson op.cit. p.52.

92. Ibid. p.53.



## CHAPTER V

## MEANING AND CLASSIFICATION

I. INTRODUCTION: CLASSIFICATION AND THE  
CONCEPT OF 'CLASS'

The concept of meaning is linked very closely with that of classification. Although 'meaning' is often thought of as referring to the sense of a word, it can also be thought of as referring to its scope. Indeed a distinction between the two is largely artificial. As we saw in our study of vagueness, interpretative problems often centre around the question of whether it is permissible or possible to include a particular fact situation within the scope of an expression. Much interpretation can be thought of as a classificatory process; do the relevant facts fall within the statutory terms? Is a bicycle a 'carriage'? Is an album a 'book'? Is sandstone a 'mineral'? These are all familiar types of question to the lawyer involved in interpreting statutes. As with all classification the issue ultimately resolves itself to one of inclusion and exclusion. The class of thing into which something is included or from which it is excluded may be indicated by a statutory phrase or by a single word. Class words or 'names' form a major part of our vocabulary. An investigation of their formulation and nature reveals the very problems to which any attempt at classification is subject.

All class-names are arrived at by a process of

abstraction. This process has been described as the imaginative selection of some characteristic so that it may be attended to in isolation.<sup>1</sup> We perceive similarities in the things about us and group these similar features together under the one 'name'. This process is vital to both thinking and communication. But such abstraction is for linguistic convenience alone. Qualities and relations such as 'redness', 'justice', 'peace' may seem to be objectified in language but nowadays both semanticists and philosophers agree that they are not to be found by themselves anywhere.<sup>2</sup> Such classes are a characteristic of language, not of reality. This was not always thought to be the case. The medieval philosophical dispute as to the reality of 'universals' was on just this point; do classes exist in nature outside the mind or are they merely a linguistic invention devised for ease of communication? Those philosophers who argued for the objective reality of universals were called Realists; those who considered the only reality consisted of individuals possessing certain attributes were called Nominalists.<sup>3</sup> On the whole the nominalist position attracted the greatest support. Certainly very few modern philosophers or semanticists would support the view that concepts of quality or relation exist in the world quite independently of their concrete manifestations.<sup>4</sup>

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1. Stebbings, 'Modern Introduction to Logic', 2nd ed. p.7.

2. G. Williams, 'Language and the Law' 61 LQR 71 at p.83.

3. See G. Williams *ibid.* pp 81-2 for fuller discussion of this controversy.

4. *Ibid.* p. 82.

The creation of linguistic classes may be vital to communication but it is also the cause of much uncertainty. It is impossible to define the scope of class words with anything nearing absolute precision. The reason is simple. Words cannot be accurately defined if the concepts they denote are themselves incapable of precise definition. Classes do not exist in nature ready-made with clear-cut edges.<sup>5</sup> Our attempt to draw boundaries around them is a linguistic contrivance having nothing to do with reality. Part of the problem arises from the static nature of class words and the dynamic nature of the things they refer to and part arises from the process of abstraction itself; the perception of similarities in spite of the differences, it has been called.<sup>6</sup> Agreement is required as to the qualities to be regarded as essential for membership to the class. But what if a new potential member appears with certain additional qualities not previously catered for, or minus some of those qualities previously regarded as essential for membership to a class? The black swan illustration was just such a case. Indeed this problem of dealing with the differences between members and potential members of a class is the very problem at the heart of vagueness itself. As G. Williams says:

"There are no words for a class, quality or relation the application of which to concrete instances is not capable of giving rise to difficulty. It is not that similarities and differences do not exist in nature; they abound in nature. The difficulty is in drawing firm lines around or between them." 7

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5. Ibid. p. 189.

6. Ibid. p. 82.

7. Ibid. p. 190.

## II. TYPES OF CLASSIFICATION

### (1) Logical Classification

Logical classification into genus and species was first systematically discussed by Aristotle<sup>8</sup> who regarded it as the one 'true' method of definition. The method can be loosely described in terms of classes as follows. The members of any class may be divided into subclasses. The term 'genus' and 'species' can be used loosely to name the class and subclasses. But the terms are relative. One particular class may be a genus in respect of its own subclasses and a species in relation to some larger class of which it itself is a member. Thus the class of all animals is a genus relative to the species 'man', and a species relative to the genus 'all living creatures'.

Just as a class is a collection of entities with some common property, so all members of a given genus will have some property in common.<sup>9</sup> Thus genus is divided into different species and all the members of each species have some incidental property in common which is not shared by the other species. This incidental property is what distinguishes one species from all the other species in the same genus. A classification may then be made on the basis of genus and difference. 'Man' may be defined as a 'rational animal'. The species 'man' is subsumed under the genus 'animal' and the difference between it and other species is its

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8. See Aristotle's 'Categories'.

9. See I.M. Copi 'Introduction to Logic' 4th Edition p. 134.

'rationality'. Logical classification thus involves identification of a member of a class and the distribution to that member of the essential attributes of that class.

## (2) Analogical Classification

'Analogy' is commonly understood to mean a resemblance or likeness of any nature or degree and argument by analogy is an inference based on such resemblance or likeness.<sup>10</sup> Analogical reasoning is thus based on equivalence; from the basis of one similarity the probability of another is inferred. The number of points of resemblance is immaterial; what matters is the 'importance' of the resemblance. This 'importance' is relative to what is sought to be inferred from the analogy.<sup>11</sup> Points of difference are also relevant as these may tend to weaken the acceptability of the analogy.

In scientific argument analogy does not prove the conclusion but simply makes it more or less probable.<sup>12</sup> Scientific conclusions drawn from analogy therefore should always be tested or sustained by other methods. Analogical reasoning as applied to statute law probably resembles this scientific approach more closely than it does analogical reasoning in case law. In the latter case analogy is regarded as the basis of an

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10. See for example P. Coffey, 'The Science of Logic' (Longmans, Green and Co., London, New York, 1912) reprinted in part in 'Readings in Jurisprudence' edited by J. Hall at p.561. Also see J. Austin 'Excursus on Analogy: Analogical Reasoning and Syllogism' also reprinted in part in 'Readings in Jurisprudence' at p. 564.

11. P. Coffey *ibid.* p. 564.

12. *Ibid.* p.562.

'ought' step in decisions.<sup>13</sup> In interpretation the relationship between similar terms is a much looser one and usually needs some additional form of 'corroboration'.<sup>14</sup> For example, this may be from compliance with the supposed legislative intent or public interest. Unlike logical classification, analogical classification proceeds from instance to instance with no clear and conclusive premise connecting each instance. Failure to support a proposed conclusion by evidence other than mere analogy could easily lead to the situation where a case brought under the law by one analogy is employed to bring in yet another by a new and unrelated analogy.<sup>15</sup>

### III. DEFINITION

Classification presupposes definition insofar as definition is taken to mean identification of the essential characteristics of a class. By now it will be becoming clear that the two overlap to a great extent. Indeed, classification and definition are largely one and the same thing. The present distinction between them is artificial and solely for convenience of discussion.

#### (1) General Theory

Words have no single 'true' definition. Different definitions are 'proper' or appropriate for different

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13. See J. Austin, 'Lectures on Jurisprudence', vol.2.

14. See W.G. Hammond, 'On Analogy and the Ratio Legis' reprinted in part in 'Readings on Jurisprudence' at p. 569.

15. Ibid. p.569.

purposes.<sup>16</sup> I.M. Copi has identified five such purposes:<sup>17</sup>

1. To increase vocabulary. Sometimes we require a deliberate explanation of the meaning of unfamiliar terms. A definition provides this explanation.
2. To eliminate ambiguity. Many words have more than one sense attaching to them and the intended sense may not always be revealed by the relevant context. Definitions explain the different meaning of ambiguous terms and so clearly identify, and hopefully eliminate, the ambiguity.
3. To reduce vagueness. The purpose of definition here is to clarify the meaning of a term known to us. A definition is given to allow decisions to be made about the word's applicability in a given 'borderline' case. In the case of interpretation if no existing definition is sufficiently precise to determine the question, then the court in making a decision is in fact promulgating a new legal definition which will clarify the scope of the vague term to a greater degree than before.
4. To explain theoretically. Definition is sometimes used to formulate a theoretically adequate or scientifically useful characterisation of the objects to which it is applied. The scientists' definition of 'force' as the product of mass and acceleration is one such definition.
5. To influence attitudes. Finally, a word may be defined

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16. G. Williams, op. cit. p. 388

17. I.M. Copi, op. cit. pp. 108-112.

so that attitudes may be influenced by emotive means.

Such a definition is expressive rather than informative.

The lawyer will obviously be concerned principally with 1), 2) and 3)). The type of definition he resorts to will have a direct bearing on the deficiency giving rise to the need for definition. Some types are clearly of more relevance to him than others.

The definition given to a new term when first introduced is called a stipulative definition.<sup>18</sup> In effect it is a proposal or resolution that all future use of a term be in the manner indicated. Specially assigned meanings fall under this category. In law, new technical terms are introduced for a variety of reasons, principal among them being the desire for precision and abbreviation.

Lexical definitions<sup>19</sup> arise where the purpose of definition is to eliminate ambiguity or to explain the meaning of unfamiliar terms. Unlike a stipulative definition, the term being defined already has an established usage. Its correctness or otherwise depends on its degree or correspondence to that established usage. Many words are used differently by different groups of people, and the usage of any sizable group of speakers should be reflected in the lexical definition. It should be noted that literary and academic vocabularies tend to lag behind everyday use of words. Definitions which restrict themselves to usage by these particular groups are likely to be a misleading indication of ordinary meaning.

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18. Ibid. p. 118.

19. Ibid. p. 120.



Neither stipulative nor lexical definitions can reduce a term's vagueness. Reference to ordinary usage is of no assistance since ordinary usage is itself not sufficiently clear. If it were the term would not be vague. A definition capable of resolving borderline cases must go beyond established usage but must nevertheless remain true to that usage. Such a definition can be called a precising definition.<sup>20</sup> The extent to which the definition goes beyond established usage is partly a matter of stipulation but not completely so. Judicial clarification of statutory terms to include or exclude the case at hand involves precising definition. The very fact that arguments are heard from both sides indicates that the resulting definition is not mere stipulation. The judge seeks to be guided partly by what he supposes to be the legislative intention and partly by his conception of the public interest. The definition can be described as 'true' or 'false' only insofar as it conforms, or fails to conform, to established usage. Where that usage is unclear the matter simply becomes one of convenience or inconvenience.

A theoretical definition<sup>21</sup> is one that attempts to formulate a theoretically adequate characterisation of the objects to which it is applied. In effect it amounts to proposing the acceptance of a theory. As the basic theory changes so does the definition. Such definitions are the concern principally of scientists

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20. Ibid. p.121.

21. Ibid. p. 122.

and philosophers. Examples would be the scientist's definition of 'force' and the philosopher's attempt to define the essential characteristics of words such as 'good', 'true' and 'justice'.

The final type of definition is persuasive definition,<sup>22</sup> the purpose of which is to influence attitudes.

Various techniques may be used to produce the above types of definition. Basically these can be divided into two groups; those concerned with a word's denotation and those with its connotation.<sup>23</sup>

(a) Denotative definitions: The most obvious way to define the denotation of a term is to give examples of the items denoted by it. This method of definition can often be useful but it has limitations. It is inadequate to specify completely the meaning of any term. This inadequacy arises from the failure of denotation to determine connotation. The sentences 'The U.S. President assassinated in Dallas' and 'The President of the U.S.A. in 1962' both denote the same man but their connotation is quite different. Likewise, defining a word by identifying the items denoted by it will fail to distinguish that word from another term denoting the same objects, even though the two may not be synonymous. The difficulties increase where the enumeration of examples is partial only. Any item has many properties and could equally well be included in the denotation of many different terms.

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22. Ibid. p. 123.

23. The following discussion of denotative and connotative definitions is based largely on discussion in I.M. Copi, *ibid.* pp. 129-135.

A brief mention should be made of ostensive definition, a special kind of definition by example. Instead of naming or describing the object denoted, definition is by means of pointing or some other gesture. It has been claimed by some writers<sup>24</sup> that such ostensive definitions are 'primary' definitions upon which all other definitions ultimately rely. Modern philosophers and linguists tend to disagree.<sup>25</sup> A child's initial comprehension of language, they argue, relies not on definition but on observation and imitation.

(b) Connotative Definitions: On the whole this is by far the more satisfactory method of defining. Synonymous definition is one method falling under this head. A single word is defined by giving another word or phrase with the same meaning. Dictionaries use this method extensively;<sup>26</sup> 'injustice' is defined as 'want of equity, unfairness'; 'delete' as 'strike out, obliterate' and so on. Definition by synonyms is easy and often effective but it too has limitations. Many words have no exact synonyms. Nor can this method be used in the construction of either precisising or theoretical definitions.

Definition by genus and species can often be used where synonymous definition is unavailable or inadequate.

24. For example Augustine who considered that ostensive definition was the basis of a child's initial understanding of language. See Augustine 'Confessions', I.8.

25. See for example the views of Wittgenstein in 'Philosophical Investigations' and I.M. Copi op.cit. p.131 who argue that pointing is itself a sign whose meaning must first be understood before it can be used to indicate language use.

26. For fuller discussion of definition by dictionaries see pp.84-87 below.

This method of defining has already been discussed above.<sup>27</sup> Aristotle's claim that definition per genus et differentiam is the only one 'true' definition for every unambiguous word is no longer accepted by most linguists.<sup>28</sup> Different definitions are now regarded as proper for different purposes. The genus/species differentiation is not an objective and rigid ordering of nature but a classification made for subjective convenience.<sup>29</sup> Nevertheless it is certainly an important classification and possibly of more general application than any other definitional technique.

## (2) Definition Sections

Definition sections seek to clarify a statute by assigning statutory meanings to certain words or phrases arising within the statute. The words defined are those considered likely to give rise to uncertainty or whose statutory meaning is different from their ordinary meaning. E.A. Driedger<sup>30</sup> has identified a number of different uses of definition provisions:

(a) To Delimit. Many definitions are intended to set the limits of meaning without altering the ordinary meaning.

'property' means real or personal property.

'advertise' means to make known by the publication

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27. See pp.

28. See G. Williams op. cit. p.388.

29. Ibid. p. 388.

30. This section on statutory definition sections is based largely on Chapter VI of E.A. Driedger's 'The Composition of Legislation: Legislative Forms and Precedents' and J.F. Burrows 'Interpretation Sections' (1978) 8 N.Z.U.L.J. p.33.

or distribution of any advertisement, circular or other notice.

(b) To Narrow. A definition may narrow the ordinary meaning of a word. Things normally included are excluded either expressly or by defining limits to a word's application.

'grain' means wheat, oats, barley and rye.

'rank' means substantive rank or appointment, but does not include acting rank.

(c) To Particularise General Descriptions. A definition may restrict a word to a particular thing without altering its ordinary meaning.

'contract' means a contract made before the first day of January, 1970.

(d) To Enlarge. A definition may retain the ordinary meaning of a word but add to it a meaning not normally covered.

'lease' includes an agreement for a lease.

(e) To Settle Doubts. Sometimes a definition uses the form 'A includes B' not to add to the ordinary meaning of a term, but to settle doubts about its applicability to a certain item.

'child' includes a natural child, stepchild or adopted child.

(f) To Abbreviate or to Shorten and Simplify Composition.

'Minister' may be defined to mean 'Minister of Public Works'.

'recipient' means a person to whom payment of an allowance has been authorised under this Act.

Statutory definitions usually take one of two forms; A means B, or A includes B. 'Means' is used to restrict the ordinary meaning of a term, while 'includes' enlarges upon that meaning.<sup>31</sup> It is therefore nonsense to say that 'A means and includes B.' It is however possible to say that 'A means B and includes C.' In the latter case, the first part of the definition particularises the word being defined and the second part removes potential doubt as to the applicability of certain items.

Although statutory definitions often remove doubt, they should not be inserted unless they are needed.<sup>32</sup> Where an expression is incapable of exact definition the presence of an inadequate statutory definition may cause more problems than it solves. In such a case dictionary definitions are an adequate guide to meaning and exact interpretation can be left to the courts.<sup>33</sup>

### (3) Dictionary Definitions

Where the meaning of a doubtful word or phrase is not indicated in a definition section, and where no existing 'legal' definition<sup>34</sup> provides assistance, a court will sometimes refer to dictionary definitions. But a meaning indicated by the statutory context must always prevail over an isolated dictionary definition. A court failing to give adequate consideration and weight to the relevant statutory context falls into the

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31. E.A. Driedger, *ibid.* p. 49.

32. *Ibid.* p. 51.

33. *Ibid.* p. 51.

34. That is, definition by judicial precedent.

trap of extreme literalism.<sup>35</sup> This is not to say that dictionary definitions are immune from the influence of context. On the contrary, the very method employed by lexicographers involves an extraction of meaning from the wide range of contexts in which a word appears. The proliferation of senses of any one word is a reflection of its use in different contexts. In this respect a dictionary definition is not 'isolated'. But this is a general regard for context. Dictionaries demarcate between standard senses<sup>36</sup> but are often of little help in resolving certain other types of uncertainty, for example contextual ambiguity. Relevant statutory context must always be the final guide to meaning. As F.C.S. Schiller puts it:

"It is the desire to communicate meaning which dictates the choice of the words used, and ultimately controls their meaning. For the original compilers of dictionaries get the word's meaning from an examination of the passages in which it has been used in print. Nevertheless, the meaning (or meanings) as formulated in a dictionary never can be an absolute and infallible guide to actual usage. It represents merely an average meaning, with which the word has been used in the past, and the probable meaning, with which it will be used in the future; but it cannot prohibit its modification. To understand any particular sentence, we may have (as every school-boy translator has painfully to discover) to go beyond anything we find in our dictionaries, and in any case we have to select the 'right' meaning from those given, and to adjust their dicta to our special problem. No critic of a bad translation would allow the excuse that the wrong meanings given to the mistranslated words had been found in a dictionary." 37

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35. See critique of the literal approach to interpretation, p. 130 below.

36. M. Black 'The Labyrinth of Language', p. 179.

37. F.C.S. Schiller, 'Formal Logic', p. 17.

Dictionary definitions are most often provided by means of synonyms or paraphrase. Strictly speaking, then, the definition does not 'give the sense of' a word, but provides another expression which has the same sense as the word being defined.<sup>38</sup> If the definition is to be useful, the words it contains must be more widely used and understood than the headword.<sup>39</sup> Unfortunately this is not always possible. As Dr. Johnson noted as early as 1755:

"Many words cannot be explained by synonimes, because the idea signified by them has not more than one appellation; nor by paraphrase, because simple ideas cannot be described." 40

Words denoting colours would be an example of the former and simple relations such as 'if . . . then' and 'cause' of the latter. The result is a tendency to define many terms by means of scientific or technical definition. This in turn has led to the unfortunate tendency to assume that the 'real' or 'proper' meaning of a word is its scientific explanation. In comparison the everyday, ordinary meaning is often considered as somehow 'vague' or 'inaccurate'.<sup>41</sup> This view runs counter to modern linguistic theory and to the approach adopted in this thesis. We have seen above that the only 'proper' meaning a word has is its ordinary meaning or, in some cases, a specially assigned meaning.<sup>42</sup> On the whole dictionaries provide a reliable guide to ordinary meaning.

38. G. Leech, 'Semantics', p. 205.

39. Ibid. p.205.

40. Preface to Dr. Johnson's Dictionary 1755.

41. G. Leech op. cit. p. 207.

42. See p. 6 above.



Since courts profess to determine the ordinary meaning of statutory expressions, one might expect them to have frequent resort to dictionaries as evidence of this meaning. In practice this is not necessarily the case.<sup>43</sup> A 'legal' and very far from 'ordinary' meaning is often preferred. This practice will be commented on later. It remains to be said that where reference is had to a dictionary it must be with caution and with full understanding of the limitations of the evidence<sup>provided</sup>. This evidence must always be subordinate to that provided by the specific statutory context. It must also be remembered that no definition (apart from stipulative definitions) will fully explain all possible uses of a word. All expressions are subject to the indeterminacy of open texture. As G. Williams says:

"No definition ever states the sum total of the qualities that seem to go to the being of a thing; it always involves a selection from those qualities, and the exact selection made depends very much upon the purpose of the definition." <sup>44</sup>

Resort to a dictionary must never override judicial common sense and policy.

#### IV. CLASSIFICATION AND STATUTES

Some statutory rules are expressed partly in terms of universal description; they apply to all persons and things.<sup>45</sup> By far the majority are more restricted in their application. They are confined by means of

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<sup>43</sup>. See pp. 178-179 below.

<sup>44</sup>. G. Williams op. cit. p. 389.

<sup>45</sup>. See E.A. Driedger op. cit. p. 19.

class descriptions. The law is universal only insofar as it relates to the described class. As an essential feature of language, class descriptions are embodied in some form or other in all legal rules. Legal drafting of these rules is done against a background of logical reasoning and guided by logical consistency. Inconsistency arises where the draftsman has failed to meet this standard.

Judicial application of the legal rule also involves elements of classification. Just as the interpretative process is sometimes said to be divisible into two distinct stages, interpretation and application, so a distinction can be made between two stages of classification.<sup>46</sup> Firstly, a judge determines the characteristics of a class; he defines the class.<sup>47</sup> Where, for example, a court must decide whether X is an employee within the terms of a particular statutory provision, the judge will in theory first decide what is an 'employee'. Definition may be by any of the methods discussed or by the formulation of a test to govern the application of the class. Certain linguistic principles may be of help in determining the meaning of statutory terms. Of particular relevance to the present topic is

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46. Compare this with the approach of N. MacCormick ('Legal Reasoning and Legal Theory' p.203) who distinguishes between "problems of interpretation" and "problems of classification". MacCormick obviously limits classification to the application stage of a decision. It is submitted that this is too narrow a view of classification. Reasons for this submission are set out above.

47. This comment concerning judicial definition must be read subject to the qualification contained in Cozens v. Brutus [1973] A.C. 854 which will be discussed shortly.

the ejusdem generis principle. E.A. Driedger<sup>48</sup> has formulated the principle as follows:

"Where general words are found, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category, unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification."

It is assumed that the draftsman inserted the general words in case something that should have been included in the specific enumeration of items has been omitted.<sup>49</sup> In effect the enumeration of the species amounts to a denotative definition of the genus. For the rule to apply this genus must be able to be construed from the specific words.

The recent House of Lords decision in Cozens v Brutus<sup>50</sup> is of relevance to the process of judicial definition and must in theory be taken as a qualification to what has been said above. This case has been analysed fully elsewhere<sup>51</sup> and only brief mention of it will be made here. In the course of their judgements their Lordships examined the status of a determination as to the meaning of "an ordinary word of the English language". Lord Reid's judgement is generally taken as authoritative of the proposition that such a determination is a question

48. in 'The Construction of Statutes' p. 92.

49. R. Cross, 'Statutory Interpretation', p. 116.

50. 1973 A.C. 854.

51. For full discussion of the case see Prof. J.F. Burrows 'Some Reflections on Cozens v Brutus [1975] 4 Anglo-American LR p.366. The following discussion of the case is based primarily upon this article.

of fact and not of law. Accordingly, there is no need for a court to lay down any definition of the words in dispute or tests for determining their application.<sup>52</sup>

On its positive side, the Cozens v Brutus doctrine seeks to reverse the tendency to give more attention to judicial statements about the meaning of statutory language than to the language itself. But the doctrine is subject to many difficulties. Firstly, while attempting to mark off a category of words which do not need judicial definition, the doctrine fails to clarify the limits of this category. Professor J.F. Burrows identifies three criteria for the application of the doctrine; the word must be one 'in common use', it must be one that 'everyone understands in much the same way', it must be used in its 'ordinary' sense and not in 'some special or particular meaning'.<sup>53</sup> All three criteria fail to provide an adequately precise categorisation for the effective operation<sup>n</sup> of the doctrine. We have already discussed some of the problems associated with the concept of common usage and will discuss below the complexity of 'ordinary meaning'.<sup>54</sup> But even assuming that such a category of words could be clearly identified, the consequences of the Cozens v Brutus doctrine remain unclear. The same problems that hinder precise categorisation also operate to cause doubt about particular applications of 'ordinary' words. It is not

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52. Ibid. p. 370.

53. Ibid. pp. 372-376.

54. See pp. 120-125.

inconceivable that in the absence of any other clear guidance, the final decision might turn <sup>on</sup>/a value judgement as to the merits of the case.<sup>55</sup> This is especially so where the issue falls to be determined by a jury. The high regard our legal system has for consistency of decisions would necessitate the judiciary giving at least some idea of a word's limits. Thus we see cases defining what a word does not mean.<sup>56</sup> A multiplication of 'negative' definitions will in time determine with reasonable precision the limits of a word's application. Such a method of clarification may not be binding, but it most certainly is an act of definition. Alternatively, courts may provide useful 'guides' to meaning such as those provided for the exercise of judicial discretion.<sup>57</sup> In the final analysis, then, the Cozens v Brutus doctrine will probably make little difference to the practice, in some form or other, of judicial definition. Its effect will most likely be felt in the attitude towards such definition. It is interesting to note the attitudes reflected in the survey in Part C of this thesis. Between 1958 and 1978 (the latter being shortly after the decision in Cozens v Brutus) there was a notable reduction in cases decided solely or primarily on the basis of a judicial definition given in a previous case. While the 1978 cases continued to formulate or make reference to definitions, a decision in terms of that

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55. Prof. J.F. Burrows, op. cit. p. 380

56. see Ibid. p. 380-381 for examples.

57. Ibid. p. 382.

definition was generally supported by evidence other than the definition itself.

The second stage of interpretation involves application. At this point classification involves a determination of the actual members of a class. Is X in fact an 'employee' i.e. is he included or excluded from the statutory rule? It is submitted that this two-stage classification distinction is largely artificial. The actual decision as to a rule's application in a particular case often itself provides the definition. For this very reason the interpretation/application distinction is also an artificial one in many cases. This view is borne out by judicial practice as we shall see in Part C.

If X clearly possesses all the characteristics of an 'employee' he will immediately be included within that class by a process of logical deduction. More likely however, he will possess only some of those characteristics. The very fact that the case is being adjudicated indicates that it is a 'borderline' one and not certain. The issue therefore is whether the similarities between X and other members of the class of 'employees' are of sufficient importance to warrant his inclusion into that class. And, of course, whether the differences between them are of insufficient importance to veto such inclusion. The reasoning in borderline cases is analogical.

This conclusion bears an interesting relationship to the general issue of analogical reasoning with statutes.

The general assumption that all legislative categories are 'closed' categories has led to a prohibition on extending these categories by analogy in the way that case law can be extended and developed. Any attempt by the courts to do so is a usurpation of legislative authority and a breach of the separation of powers. No court could ever extend the operation of a statutory provision to cover cases not provided for by the legislature but which in the court's opinion ought to have been included. But it can and does use analogy to clarify the meaning of a statutory provision. It will, for instance, often determine the meaning of a particular word or phrase by reference to the meaning given to a similar word or phrase in another statute. Such a decision will usually also require support from other sources. And again, as indicated above, decisions involving the interpretation of vague terms will involve analogical reasoning. Inasmuch as all words are vague in their application to some extent and all are open-textured in nature, legislative categories cannot always be regarded as 'closed'. It is the daily business of the courts to determine 'borderline' cases; cases not expressly provided for by the enacting words. The rationale of permitting analogical reasoning in some cases but not others is traditionally expressed in terms of a distinction between legislating and interpreting. But any such distinction is a very grey one indeed. For what is a court doing in such 'borderline' cases if not creating a rule with regard to the particular case where no rule existed before?<sup>58</sup>

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58. For discussion of the judicial role see pp. 135-136 and pp. 241-2

PART B: JUDICIAL APPROACHES TO MEANING - THE THEORY

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## INTRODUCTION

In Part A we examined semantic and philosophical approaches to meaning. In Part B we will examine the approach of judges, lawyers and jurists and the extent to which there is any relationship with those in Part A. In particular we will examine the traditional division of common law approaches into so-called 'canons' and 'presumptions'. These have developed over a long period, their logical and legal status is obscure and their effects sometimes contradictory. Attempts have been made by at least two modern jurists to achieve a rational reconstruction into a single integrated approach. These attempts have achieved only modest success. There is however a modern judicial trend towards the adoption of a more purposive approach to interpretation. In New Zealand, such an approach has received statutory recognition from as early as 1888 but with questionable results. In Britain, recent attempts to enact a similar provision have failed. This failure was primarily due to the rejection of related proposals to relax the law relating to the admissibility of extrinsic materials. These and other proposed reforms will be reviewed.



## CHAPTER VI

## PRELIMINARY ANALYSIS OF BASIC CONCEPTS

By an 'analysis of basic concepts' is meant an analysis of the logical character of the various legal approaches to statutory interpretation. The modern tendency until recently has been to say that these approaches consist of certain 'canons' and 'presumptions'. In the past, however, they were often referred to as 'rules' or 'principles'. The very recent tendency has been to refer to them as 'pointers' to the legislative intention. Is it possible to make analytical sense out of this terminological confusion and does it matter what we call the various approaches?

Rules and principles are often regarded as species of standards, taking 'standard' to be the broad genus.<sup>1</sup> Roscoe Pound defined a rule as "a precept attaching a definite detailed consequence to a definite detailed state of facts" and gave a number of examples from early laws.<sup>2</sup> In his book, 'The Concept of Law', H.L.A. Hart equivocated over the meaning of 'rule' but was thought by Ronald Dworkin to take the view that a rule was something which bound in an all or nothing fashion.<sup>3</sup> Dworkin is quite wrong in this since Hart did not tie himself down to any precise definition of 'rule'. It

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1. See e.g. Raz [1972] Yale Law Journal, But compare this definition of 'standard' with that given by Julius Stone in 'From Principles to Principles' 97 LQR 224.

2. See R. Pound 'Social Control Through Law', p.45.

3. See R. Dworkin, 'Taking Rights Seriously' p.22.

may be that Dworkin was attributing to Hart the definition of Pound. Be that as it may, our statute books are full of 'rules' prescribing precise legal consequences for detailed sets of facts. The Crimes Act 1961 is an obvious source of examples.

Both Pound and Dworkin distinguish between rules and principles. Pound takes the Aristotelian meaning of an authoritative starting point for legal reasoning.<sup>4</sup> Dworkin thinks of principles as having a looser character than rules and having an ethical content. Julius Stone takes a similar view and regards principles as being of more general form than rules and containing value components or 'standards' such as good faith and reasonableness; for example, 'no man shall profit from his own wrong'. Standards are thus defined by Stone as "those elements which are found embodied at a particular time in existing principles but are also available for embodiment in new principles which may yet emerge to cover new or changed circumstances as these present themselves for decision."<sup>5</sup> An alternative view of principles, however, is that they are similar in form to rules but simply of more generalised expression. They will often have, but need not have, an ethical content.<sup>6</sup> In this latter sense they can perhaps be equated with canons and maxims. Etymologically 'canon'

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4. See Aristotle's 'Metaphysics' and R. Pound's 'Social Control Through Law' p.45.

5. See J. Stone, 'From Principles to Principles' 97 LQR 224 at 229. Compare this definition of 'standard' with that adopted by Raz [1972] Yale Law Journal.

6. See J.H. Farrar, 'Introduction to Legal Method', Chapter 1.

comes from the Greek word meaning 'rule' but in modern usage it usually refers to something more general than a rule (the term 'rule' being used in the narrower sense of Pound). Canons have a technical meaning in ecclesiastical law but that need not concern us here.

Presumptions are indicators of intention. Their precise judicial nature is often unclear however. F. Bennion<sup>7</sup> identifies three views as to their nature. Firstly, the Law Commissions call them 'presumptions of intent'.<sup>8</sup> It is presumed that Parliament does not intend to do certain things. Where statutory language is doubtful, the presumption forms part of the evidence as to what the intent actually was. Alternatively, Hart and Sacks have called presumptions 'policies of clear statement' - announcements to the legislature that certain meanings will not be assumed unless stated with special clarity.<sup>9</sup> Thirdly, presumptions can be regarded as an aspect of the court's function of administering justice. Regardless of parliament's intention, it is unjust to burden the citizen without telling him clearly what you are doing. If meaning is doubtful, he should be allowed to remain in his previous condition. These three views, says Bennion, can be amalgamated: Parliament is presumed to intend to act fairly. If it wishes to act unfairly, the court will not aid it unless the intention is made abundantly plain. In evidence there are two species of presumption - rebuttable and irrebuttable.

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7. F. Bennion, 'Statute Law' p. 86.

8. See Law. Com. No. 21, p.21.

9. See Law Comm. No. 21, p.21.

When used in relation to interpretation of statutes the presumptions are rebuttable by reference to the words of the statute i.e. the presumed meaning of part of the Act can be rebutted by reference to another part of the Act. This is not usually discussed in terms of rebutting presumptions but in terms of ambiguity.

There has been a recent tendency amongst some of the judiciary to regard all the approaches to statutory interpretation as capable of being described as 'pointers' to intention.<sup>10</sup> This is a nebulous term which adds little to the elucidation of the subject.

But what is the significance of this analysis? It has been argued by Ronald Dworkin, although not with any great degree of clarity, that the difference between rules, principles and standards has logical effects in the sense that reasoning with rules is different from reasoning with principles and standards. Clearly insofar as 'rule' is capable of a narrow definition, either in Pound's sense or Dworkin's sense, reasoning with it can be more of the character of a logical syllogism. Reasoning with a principle, in the sense of that term used by Dworkin and Stone, not only results in a looser-knit type of reasoning but also involves elements of evaluation. Unlike rules which are predicated solely on facts, principles, says Stone,<sup>11</sup> are predicated on facts evaluated by standards such as reasonableness

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10. For example, see Lord Reid in Maunsell v Olins [1975] AC 373, 382.

11. 'From Principles to Principles' op. cit. p.228.

and good faith. The application of a principle does not therefore necessitate the making of one decision only, as the standards on which the principle is based are not verifiable by mere empirical observation.<sup>12</sup>

Application of a principle involves an evaluation of the circumstances of the particular case in terms of the given standard or value. Hence an element of discretion is involved. The decision-maker will still of course be bound — not to one 'correct' decision, but to give effect to the embodied standard or value in the circumstances of the case.<sup>13</sup> However, as we have seen, an alternative view is that principles and canons need not necessarily have an ethical content. Decisions involving principles under this view will still involve an element of discretion; discretion arising from the more generalised nature of the principle, the expression of which often omits any detailed description of consequence.

In the interpretation of statutes it would seem that the so-called 'canons'<sup>14</sup> are too loose in their expression to be rules. Inconsistency in their content also eliminates them from this category. Probably they are very generalised principles although an attempt has been made to express them in the form of presumptions.<sup>15</sup> One of them, the literal 'rule', has no ethical content,

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12. Ibid. p. 229.

13. Ibid. p. 229.

14. Being used here to cover the literal, golden, and mischief approaches.

15. See F. Bennion, op. cit. p. 84.

whereas another, the so-called golden 'rule', does have some value elements. So too, but to a lesser extent, does the mischief 'rule'. The looseness of their expression due to their level of generality means that they will never necessitate a decision. The presence of value elements in two of them will also lead to ad hoc choice. Presumptions, as such, are not a device for logical reasoning at all. They indicate intention rather than necessitate firm conclusions.

Although the canons are clearly not rules in the strict sense, it has been so much the convention to refer to them as such in the past that to refer to them as anything else seems artificial. Therefore, on occasion, the canons shall be referred to as rules simply to conform with conventional practice.

## CHAPTER VII

## THE CANONS: HISTORY

The early medieval period was marked by a great freedom in the interpretation of statutes.<sup>1</sup> There are a variety of reasons why this was so. Firstly, the judges were members of the Curia Regis and took a part in the formulation of legislative policy and often in the drafting of particular Acts. It posed little problem to determine the real intention of an Act, for the judge as law-maker was simply explaining his own policies.<sup>2</sup> As members of both the legislature and the judiciary, it was natural that the judges should be allowed considerable latitude in the interpretation of statutes. Secondly, early statutes themselves bore little resemblance to modern legislation. As T. Plucknett says:

"[written statutes] were not essential in our earlier history. The King could legislate . . . without parchment, ink or wax. Even when a written text was drawn up, it was merely evidence, and by no means the best evidence, of what had been done. We therefore find that the wording of a statute is not at first taken very seriously. Copies used by the profession were only approximately accurate; even government departments and the courts were no better off; the recording of statutes in the national archives was by no means regular.

Interpretation in this early period could not be precise. There was no sacrosanct text, but only a traditional one whose meaning was restricted to general policy, details being left to be filled in as required by the legislator, or by the council or the courts . . ."<sup>3</sup>

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1. See T. Plucknett 'A Concise History of the Common Law' (5th ed) p. 331-332.  
 2. Ibid. p. 331.  
 3. Ibid. p.340.

By the middle of the fourteenth century this freedom of interpretation begins to disappear and judges begin to interpret statutes strictly.<sup>4</sup> The judiciary now form a separate body and perform a separate function from the Council. The intention of the law-makers is to be ascertained from the words of the statute itself. Also of significance to the new attitude to interpretation was the emergence of the Chancery as a court exercising the Council's discretion. Statutes are now regarded as texts to be interpreted exactly as they stand.<sup>5</sup> But this new strict approach to interpretation is not to be confused with a literal approach. The strict approach manifested seems merely to be a reverse of the earlier liberal approach. This is emphasised in Sharesulle's speech in Waghan v. Anon<sup>6</sup> where he said, "Nous ne poms prendre le statut plus avant qe les paroles en ycele ne parle". (we cannot take the statute further than the words themselves provide).

Throughout the fifteenth and into the sixteenth century the courts developed an elaborate and complex system for the interpretation of statutes.<sup>7</sup> There developed what Plucknett calls "a multiplicity of rules" available for the interpretation of any particular statute; rules so diverse and various that almost any conclusion might be reached merely by selecting the appropriate one. Probably Plucknett has in mind something more of the nature of a complex of presumptions rather

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4. Ibid. p.333.

5. Ibid. p.333.

6. YB 20 Edw. III, II 198.

7. T. Plucknett, op. cit. p. 334.



than rules. As a general theoretical justification for the liberty enjoyed by the courts in construing statutes lawyers adopted the word 'equity'.<sup>8</sup> Equity of the statute, in the sense of the term used by Plucknett, is a continental notion imported to explain the situation that had grown up in England. Equity was "the correction of that wherein the law (by reason of its universality) is deficient."<sup>9</sup> This is the wider sense in which the concept of equity of the statute is used. For the narrower sense see the definition of Coke in his

Institutes:-

"Equity is a construction made by judges that cases out of the letter or the statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth, and the reason hereof is, for that the lawmakers could not possibly set down all cases in express terms." <sup>10</sup>

In practice, application of this principle had even more far-reaching effects. Cases within the letter but outside the mischief of an Act were sometimes ignored by the courts. This narrower sense of equity of the statute is also manifest in Plowden's note to Eyston v. Studd<sup>11</sup> and was based on Aristotle's discussion of equity in his Ethics Book V.

About the same time as the equity of the statute approach was gaining recognition in England, the Barons of the Exchequer laid down what was really the earliest fully articulated canon of construction, the so-called

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8. For this definition of the term 'equity' see T. Plucknett *ibid.* p.336.

9. Blackstone, 'Commentaries', i. 61.

10. I Inst. 24(6).

11. (1574) Plow. 459, 465.

mischief rule.<sup>12</sup> Courts were enjoined to make such construction as would suppress the mischief at which the act was aimed and advance the remedy provided by the Act. The reasons for an enactment thus became a relevant consideration in its interpretation.<sup>13</sup>

It is fashionable to regard this mischief approach as the most liberal of the canons although to comment on the fact that it reflects an archaic constitutional position.<sup>14</sup> In fact a better view is that the mischief approach represented a compromise between the early strict approach and the more recent and very liberal equity of the statute approach. The rule laid down in Heydon's Case was in fact far more restrictive than the latter.

Heydon's Case was decided in a period before Parliamentary sovereignty had been completely established.<sup>15</sup> The 1688 Revolution firmly established Parliament and the judiciary as separate bodies performing distinct functions. At the same time we see an increasing lip-service being paid to a second canon known as the literal 'rule'.

The traditional view has been that the literal approach represents an attempt by the courts to cut down the scope of legislation. This view is questionable for

12. For the Barons' formulation of the mischief rule see p. 114 below.

13. A parallel approach to statutes is to be found in Scottish decisions. See for example the cases of Campbell v. Grierson (1848) 10 D. 361 and Magistrates and Town Council of Glasgow v. Commissioners of Police of Hillhead (1885) 12 R. 364.

14. See Law Com. No. 21 p.19.

15. See R. Cross, 'Statutory Interpretation' p.9.

two reasons. First, it could equally be regarded as self-restraint by the courts. Interpretation represents potential law-making by the courts. A very liberal interpretation is capable of extending the scope of a statute. After the revolution of 1688 (with its recognition of separation of powers) the courts were more likely to feel the need for self-restraint. On the other hand, by the same doctrine they were obliged to give effect to the manifest will of Parliament. If the literal approach is expressed in terms of adopting the ordinary meaning of words and an attempt is made to interpret the will of Parliament through the ordinary meaning of the language used, this arguably represented a reasonable compromise between a liberal and a strict approach. It was not perfect in all respects and hence the later formulation of the golden rule which allowed an ad hoc solution to the problem.

It has never been hitherto mentioned, but it is interesting to note that this literal approach developed with the beginning of systematic lexicography. True, England had failed to set up an Academy similar to those of France and Italy to act inter alia as an authoratative body in respect of the language but, by the time of Dr. Johnson's dictionary in 1755, English lexicography had made considerable advances.<sup>16</sup> Dr. Johnson's dictionary was the first English dictionary systematically to give contexts from literature. Armed with such

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16. See 'Dr. Johnson's Dictionary' by J.H. Sledd and G.J. Kolb. Also generally on the history of dictionaries see 'Caught in the Web of Words' by K.M. Elisabeth Murray.

dictionaries the judges were more able to ascertain with confidence the ordinary meaning of words.

It has already been noted that when taken too far the literal rule can lead to injustice. Hence the need for some form of modification to take account of those situations where application of the rule led to a repugnance, absurdity or inconsistency. The so-called golden rule began to make its appearance about the middle of the eighteenth century and is essentially the literal rule with a qualification to cover such situations.

Although they did not disappear completely, cases adopting a mischief approach for a time were outnumbered by those adopting an essentially literal approach. Despite statutory embodiment of a direction to adopt a purposive construction in section 5(j) of the New Zealand Acts Interpretation Act 1924,<sup>17</sup> statutes continued to receive a literal construction in a large number of cases. More recently, judicial attitudes in New Zealand appear to have changed yet again. A return to a more purposive approach is generally apparent and seems to be the dominant trend in current judicial interpretation. In Britain the literal approach, tempered by the qualification contained in the golden rule, continued to dominate interpretation well into this century. As late as the late 1950's T. Plucknett felt able to write that "in the last two or three generations [the courts] have accepted the theory of their absolute submission to the word and the letter of the legislature."<sup>18</sup>

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17. For discussion of this section see pp. 167-170.

18. T. Plucknett, op. cit. p.340.

Then in 1969 the English and Scottish Law Commissions published their Report on the Interpretation of Statutes<sup>19</sup> which favoured a new Interpretation Act which would contain a general provision mandating the courts to take a more purposive approach to interpretation. The influence of this Report can be detected in cases following, especially those of Lords Diplock and Simon of Glaisdale, who through case law have sought to introduce the purposive approach favoured by the Commissions. It is interesting to note that both Lords Diplock and Simon have been Chairman of the U.K. Statute Law Committee and have consequently taken a special interest in legislation. This new purposive approach to interpretation is essentially a modern expression of the old mischief approach. As Viscount Dilhorne said in Stock v. Frank Jones (Tipton) Ltd:-<sup>20</sup>

"It is now fashionable to talk of a purposive construction of a statute, but it has been recognised since the seventeenth century that it has been the task of the judiciary in interpreting an Act to seek to interpret it 'according to the intent of them that made it' (Coke 4 Inst. 330)."

Despite recent attempts by Lord Scarman to have his Interpretation Bill made law,<sup>21</sup> there has been as yet no statutory enactment of a purposive approach in Britain.

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19. For a full discussion of this Report see pp. 213-217 below.

20. [1978] 1 WLR 231; [1978] 1 All E.R. 948 at p.951.

21. For a full discussion of this Bill and its progress through Parliament so far see pp.218-221 below.

## CHAPTER VIII

## THE CANONS: TRADITIONAL AND MODERN JUDICIAL FORMULATIONS

## I. THE LITERAL RULE

We have seen how a distinction is drawn between strict and liberal interpretations. This distinction was drawn by commentators on the medieval period and still holds true today. Indeed the distinction between strict and liberal interpretation is a common one in Roman and modern civilian systems. The strict approach is often equated with the literal approach although this can often be misleading. A strict approach can be narrower than the literal approach.

It has been said 'that the first and most elementary rule of construction' is that words should be interpreted in accordance with their ordinary meaning or their technical meaning if they have acquired one.<sup>1</sup> This was expressed by Bayley J. in R v. Inhabitants of Ramsgate<sup>2</sup> in these terms:-

" It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed."

A more extreme formulation was expressed by Lord Atkinson in Vacher & Sons Ltd. v. London Society of Compositors.<sup>3</sup> He said:-

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1. See 'Maxwell on the Interpretation of Statutes' (12th ed.) p. 28.  
 2. (1827) 6 B & C 712.  
 3. [1913] AC 107.

"If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this sub-section be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust; beneficial or mischievous." <sup>4</sup>

More recently, Lord Diplock expressed similar sentiments in Duport Steels Ltd. v. Sirs:<sup>5</sup>

"At a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interprets them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases) the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what the intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount."

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4. At pp. 121-2.

5. [1980] 1 All ER 529.

In the cases, different formulations have sometimes been adopted. The judges have referred to ordinary meaning,<sup>6</sup> natural meaning,<sup>7</sup> plain meaning,<sup>8</sup> received meaning,<sup>9</sup> popular meaning,<sup>10</sup> everyday meaning,<sup>11</sup> approved meaning,<sup>12</sup> recognised meaning<sup>13</sup> and straightforward meaning.<sup>14</sup> Recently, Lord Simon of Glaisdale has commented:-

"Nowadays we should add to 'natural and ordinary meaning' the words 'in their context and according to the appropriate linguistic register.'" <sup>15</sup>

The justification of the rule is the presumed intention of the legislature. The literal rule or approach appears to be a presumption as to the legislative intent. In other words, Parliament is presumed to have used words in their commonly accepted meaning unless there is a technical meaning or contrary intention. Sometimes the literal approach has been expressed in terms of a "prima facie preference".<sup>16</sup> A further aspect of this justification is that people may have relied on Parliament using words in accordance with their ordinary meaning. In all fairness their reasonable expectations

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6. e.g. Stock v Frank Jones (Tipton) Ltd. [1978] 1 All E.R. 948. Also Pearson v IRC [1980] 2 WLR 872, 876.
  7. See e.g. United States v Cooper Corp. 312 US 600; Also Pearson v IRC [1980] 2 WLR 872, 876.
  8. See e.g. Hutton v Phillips (1949) 45 Del 156, 160. Also Gwynne v Burnell 7 CL & Finn. 696.
  9. See e.g. Deputy v DuPont 308 US 488, 84 L Ed 416, 60 S Cr 363.
  10. See e.g. Deputy v DuPont loc.cit.
  11. See e.g. Crane v Commissioner 331 US 1, 91 L Ed 1307, 67 S Cr 1047.
  12. See e.g. Evans v Kroh (Ky) 284 Sw 2d 329, 58 ALR 2d 1446.
  13. See e.g. Victory Cable Co v Charlotte 234 NC 572, 68 S E 2d 433.
  14. See Stock v Frank Jones (Tipton) Ltd. loc. cit.
  15. Ibid. p. 952.
  16. See American Jurisprudence Vol. 73 p. 403.



from such a construction should be upheld.<sup>17</sup>

We have seen above how Lord Atkinson in Vacher's Case was prepared to recognise the literal approach even when it led to absurd results. Fortunately that approach has not completely prevailed. The literal approach has yielded on occasion to the golden rule, to which we must now turn.

## II. THE GOLDEN RULE

An early expression of the golden rule is contained in the Irish case of Warburton v Loveland dIvie,<sup>18</sup> subsequently affirmed by the House of Lords, where Burton J. said:

"It is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such inconvenience, but no farther."<sup>19</sup>

In R v Banbury,<sup>20</sup> Parke, B., later Lord Wensleydale, said:

"the rule of construction is to intend the legislature to have meant what they have actually expressed unless a manifest incongruity would result from doing so."

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17. See Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All E.R. 810 at 836 per Lord Diplock.

18. (1828) 1 Hud & B 623.

19. Ibid. p. 648.

20. (1834) 1 A & E 136.

In 1836<sup>21</sup> he put it in more elaborate terms in the following famous passage:-

"It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnancy, in which case the language may be varied or modified so as to avoid such inconvenience, but no further." 22

Later, as Lord Wensleydale, in Grey v Pearson<sup>23</sup> he expressed the rule as follows:-

"in construing statutes . . . the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther."<sup>24</sup>

It can be seen from the above that the first thing to do is to apply the literal approach. If the words of the statute are unequivocal that is the end of the matter. If, however, a secondary meaning is possible which would avoid an incongruity, absurdity, repugnance or inconsistency then this is to be adopted. The difficult question is what degree of absurdity etc. is necessary before the primary meaning can be departed from. On occasion, some of the judges have said that there must be a great or manifest absurdity.<sup>25</sup> Recently the House of Lords in Stock v Frank Jones (Tipton) Ltd<sup>26</sup> have laid down an 'anomalies' test. Lord Simon of

21. Becke v Smith (1836) 2 M & W 191.

22. Ibid. p. 195.

23. (1857) 6 H.L.C. 61.

24. Ibid. p. 106.

25. See for example Becke v Smith (1836) 2 M & W 191. Also see Lord Esher MR in R v City of London Court Judge [1892] 1 QB 273 at 290.

26. loc. cit.

Glaisdale expresses this test as follows:-

"A court would only be justified in departing from the plain words of the statute where it is satisfied that

- 1) there is a clear and gross balance of anomaly.
- 2) Parliament, the legislative promoters and the draftsmen could not have envisaged such anomaly and could not have been prepared to accept it in the interest of supervening legislative objective.
- 3) the anomaly can be obviated without detriment to such legislative objective.
- 4) the language of the statute is susceptible of the modification required to obviate the anomaly." 27

It is clear that in any analysis of this kind the court is not simply construing the statutory rule in its immediate context but also in the broader context of its consequences. It is not clear whether the English cases go so far as to recognise a rule that the golden approach is to be adopted where the literal rule will lead to unfairness or injustice. In America, the cases are more various and it seems that in the construction of a statute considerations of what causes injustice<sup>28</sup> could have a potent influence.<sup>29</sup> Again, the courts will assume an intention not to discriminate unjustly between different classes of the same kind.<sup>30</sup> There is even a doctrine expressed in the language of presumption that the legislature is to be presumed not to have intended a rule attended with inconvenience,<sup>31</sup> hardship,<sup>32</sup> or oppression.<sup>33</sup> In some respects these

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27. Ibid. p. 955c.

28. See e.g. Denver v Holmes 156 Colo 586, 400 P 2d 907.

29. For American approach generally see American Jurisprudence Vol. 73 p. 429.

30. See e.g. Kellum v Johnson 237 Miss 580, 115 So 2d 147.

31. See e.g. Randall v Richmond & DR Co. 107 NC 748 12 SE 605.

32. See e.g. People v Frank G. Heilman Co. 263 Ill App 514.

33. State v Standard Oil Co. 188 La 978, 178 So 601.

American cases seem to go further than the golden rule. It can be argued that they have the advantage of being more explicit. The language of Lord Wensleydale is very vague and it is difficult to tell in advance whether a particular court will find the particular characteristics which he lists present. That is quite apart from his equivocation in the description of these characteristics.

### III. THE MISCHIEF RULE

Whereas there is an interlocking symmetry between the literal and golden rules there is an unfortunate confusion between the literal and mischief rules. We will now deal with the old and new formulations of the mischief rule.

As we have seen, this is the earliest articulated approach, although not necessarily the earliest approach. It was laid down by the Barons of the Exchequer in Heydon's Case.<sup>34</sup> Their resolution as contained in Coke's Reports reads as follows:-

"And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law), four things are to be discerned and considered:

1st, What was the Common Law before the making of the Act.

2nd, What was the mischief and defect for which the Common Law did not provide.

3rd, What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth,

And, 4th, The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the

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34. (1584) 3 Co. Rep. 7a.

mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy according to the true intent of the makers of the Act, pro bono publico."

We have already discussed the relationship between this and the earlier strict and free approaches to interpretation of the medieval judges. We have also discussed the relationship between the rule and the equity of the statute approach. The mischief approach was the dominant approach of the seventeenth and early eighteenth centuries. It is interesting to note that it is the only approach mentioned by Blackstone in his Commentaries.<sup>35</sup>

The courts have continued to make reference to the mischief approach although it lost favour as the dominant approach in the late eighteenth and nineteenth centuries. Recently the mischief approach has been revived as the dominant approach. In his dissenting speech in Maunsell v Olins,<sup>36</sup> Lord Simon of Glaisdale engaged in an elaborate explanation of the mischief approach in the following terms:

"The rule in Heydon's Case itself is sometimes stated as a primary canon of construction, sometimes as secondary (i.e. available in the case of an ambiguity): cf. Maxwell pp 40, 96, with Craies on statute law, 7th Ed.(1971), pp 94,96. We think that the explanation of this is that the rule is available at two stages. The first task of a court of construction is to put itself in the shoes of the draftsman - to consider what knowledge he had and, importantly, what statutory objective he had - if only as a guide to that linguistic register. Here is the first consideration of the mischief. Being thus placed in the shoes of the draftsman, the court proceeds to ascertain

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35. See Blackstone 'Commentaries' Vol. 1.

36. [1975] AC 373.

the meaning of the statutory language. In this task the first and most elementary rule of construction is to consider the plain and primary meaning, in their appropriate register, of the words used. If there is no such plain meaning (i.e. if there is an ambiguity), a number of secondary canons are available to resolve it. Of these one of the most important is the rule in Heydon's Case. Here, then, may be a second consideration of the mischief."<sup>37</sup>

In its abbreviated formulation as the purposive approach the rule has found favour with several Commonwealth jurisdictions. Some, like New Zealand, have enacted it in statutory form. Others regard it as the "better practice of the courts".<sup>38</sup> In Britain, the purposive approach appeared in Lord Scarman's Interpretation Bill, although Clause 2 of that Bill seems to be intended to co-exist with the traditional formulation of the mischief and other approaches.

The mischief approach bears some resemblance to two distinct continental approaches to interpretation - the historical and teleological approaches.<sup>39</sup> The first is interpretation by reference to the legislative history and the second is an interpretation by reference to the end or purpose or social goal of the legislation.

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37. Ibid. p. 395 A-C.

38. per Lord Simon of Glaisdale House of Lords Deb. 9 March 1981 Col. 78. For present UK attitude to the purposive approach also see for example Lord Diplock in Jones v Secretary of State for Social Services [1972] AC 944.

39. See J.H. Farrar 'Introduction to Legal Method' pp 76-77.

## CHAPTER IX

## THE CANONS: DETAILED CRITIQUE

## I. THE LITERAL RULE

The literal rule is also known by the names 'ordinary-meaning rule' and 'plain-meaning rule'.<sup>1</sup> By whatever name, this approach to interpretation has come under heavy attack in recent years. In introducing his 1980 Interpretation Bill, Lord Scarman said the rule "is still lurking in the back corridors of the legal system and must be exterminated."<sup>2</sup> This approach, the argument goes, is based on an oversimple view of language and the judicial function. The aim of this section will be to analyse the content of the literal approach and to discuss the validity of the above criticisms in relation to that content. Unfortunately, analysis is made difficult by fundamental differences as to the criteria for determining the 'literal' or 'ordinary' or 'plain' meaning of words. Judicial and academic analysis of the canon is often confused. We must therefore begin with an examination of these fundamental terms.

'Literal' meaning has been defined by R. Dickerson as "the meaning carried by language when it is read in its dictionary sense unaffected by considerations of particular context."<sup>3</sup> The same sense is presumably adopted

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1. See R. Dickerson, 'The Interpretation and Application of Statutes' pp 229-233.

2. House of Lords Deb. 13th Feb. 1980 Col. 279.

3. R. Dickerson op. cit. p. 38.

by M. Zander when he criticises the rule as being based on the false premise that words have plain ordinary meanings apart from their context.<sup>4</sup> Elsewhere he criticises the equation of ordinary meaning with 'dictionary meaning', saying "those who apply the literal approach often talk of using the dictionary meaning of the words in question, but dictionaries normally provide a number of alternative meanings."<sup>5</sup> Obviously context plays no part in his analysis of 'literal' or 'ordinary' meaning. Consideration of context would almost invariably resolve doubt as to which particular dictionary definition was intended. R. Cross points out that 'literal' is often used as a synonym for 'natural' or 'ordinary' meaning but that when applied to the construction of statutes it is often used pejoratively. Then it is the meaning which results from giving to each word an ordinary meaning without much reference to the context or the statutory object.<sup>6</sup>

'Ordinary' or 'natural' meaning he describes as "the meaning which would be attached to those words and phrases by the normal speaker of English at the time when the statute was passed." Other writers, such as W.T. Murphy and R.W. Rawlings,<sup>7</sup> also recognise a distinction between 'literal' and 'ordinary' meaning; ordinary meaning being adhered to to relieve extreme literalism by an application of common sense exercised through the medium of the

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4. M. Zander, 'The Law-Making Process', p. 49.

5. Ibid. p. 50.

6. R. Cross 'Statutory Interpretation', p.59.

7. In 'After the Ancien Regime: The writing of Judgements in the House of Lords 1979/80'<sup>44</sup> (1981) MLR 617.



ordinary man.<sup>8</sup>

On the other hand, E.A. Driedger<sup>9</sup> considers that context is an integral part of determining the literal meaning of words. Supporting him in this opinion we find judicial statements of the approach such as that of Lord Simon of Glaisdale in Stock v Frank Jones (Tipton) Ltd.<sup>10</sup> where he said:

"Nowadays we should add to 'natural' and 'ordinary' meaning the words 'in their context and according to the appropriate linguistic register.'" <sup>11</sup>

Driedger goes on to discuss ordinary meaning, again emphasising the role played by context. To him,

"a meaning may be said to be ordinary if it is to be found in the dictionary. But there may be many meanings. Compilers of dictionaries usually place first in the list of meanings of a word the meaning most commonly used. This meaning is variously called the ordinary, common, popular or primary meaning. And there may be different ordinary meanings of a word for different subject matters . . . it is the ordinary meaning as applied to the subject matter that must normally be taken. But this is not an absolute rule, for in the end <sup>12</sup> the meaning of a word is governed by the context . . ."

The Concise Oxford Dictionary defines a literal interpretation as "taking words in their usual or primary sense and applying ordinary rules of grammar" to them. It thus seems to equate 'literal' meaning with 'ordinary' meaning (the latter term being defined as "normal, customary or usual") but begs the question of the extent to which context is to be considered in the determination of either.

8. Ibid. p. 625.

9. In 'The Construction of Statutes'.

10. [1978] 1 All E.R. 948.

11. Ibid. at p. 952

12. E.A. Driedger 'The Construction of Statutes' pp6-7.

To summarise, we see that different commentators understand different things by the description 'literal construction'. Some equate literal meaning with ordinary meaning. Others distinguish between the two on the basis that context plays no part in a determination of the former. It is submitted that two quite distinct formulations of the 'literal' rule are also apparent from the cases. The difference between them depends on the extent to which context is considered an integral part, not only of determining what constitutes 'clear and unambiguous' language,<sup>13</sup> but of determining the very meaning of that language. These alternative formulations will be considered in more detail below. First, a closer examination must be made of ordinary meaning itself, for it is criticism of this concept that lies at the heart of much criticism of the literal rule.<sup>14</sup> Broadly speaking, arguments against ordinary meaning are aimed

- 1) at its very existence as a unitary concept and
- 2) at its adoption as the dominant standard in the construction of statutes.

'Ordinary' meaning is often equated with 'core' meaning but the comments of L.L. Fuller and his criticisms of H.L.A. Hart's analysis of core meaning are used to argue that no such thing as ordinary meaning exists. However, insofar as ordinary meaning can be equated with

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13. For a discussion of the role of context, including statutory purpose, in the ascertainment of 'clear' meaning see the Hart/Fuller debate pp. 36-42 above.

14. For example, see criticisms of M. Zander, op.cit.p.49.

established and customary usage, the concept is a valid one. For there to be communication at all language must have some element of objectivity.<sup>15</sup> Some commonly understood meaning does attach to most words. However, this is not to say that any word will have only one ordinary meaning, nor that the decision as to what constitutes ordinary meaning in a particular case will necessarily be without dispute.<sup>16</sup> To fulfil their purpose of regulating society, statutes too must possess some element of objectivity. Arguably, this is best provided by an interpretation in accordance with ordinary meaning; the meaning in which language is understood by the average member of society. The constitutional implications of such an interpretation are considered by Lord Diplock in the Black-Clawson case:

"The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates." <sup>17</sup>

Also related to the idea of ordinary meaning is that of primary and secondary meaning. The clearest analysis of this distinction is given by Sir Rupert Cross

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15. See A.J. Ayer 'Metaphysics and Common Sense,' p. 27.

16. See pp. 123-124.

17. Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, 836.

in terms of usual and less usual meanings.<sup>18</sup> Many words and phrases have more than one usual meaning, he says, since allowance has to be made for a lot of different contexts. The choice as to which of those 'ordinary' meanings is the appropriate one in the circumstances has been discussed above. There comes a time however when although a word is capable of bearing a particular meaning, that meaning is an unusual one, that is, a secondary one. According to Cross, to say that "X acquired a fortune by accident of his birth" is to use the word 'accident' in its secondary meaning of 'chance'. A court will sometimes opt for such secondary meanings on account of the inconvenience, injustice or absurdity which would arise from an application of any of the more usual meanings. Such a situation is that envisaged by the so-called golden rule. It is submitted however that the distinction between primary and secondary meaning is largely one devised for judicial convenience and is not necessarily reflected in our everyday use of language. In the field of statutory interpretation the distinction becomes necessary to justify the adoption of what may

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18. R. Cross. op. cit. p.58. Compare this with the somewhat confused analysis of G. Williams in 'The Meaning of Literal Interpretation - Part 1', New Law Journal, November 5th 1981, p.1128. His analysis is based on a distinction between "the most obvious or central meaning" and "a meaning that can be coaxed out of the words by argument." However whereas Cross consistently recognises the role of context Williams seems only to regard context as significant for resort to a secondary meaning which is less obvious. It is submitted that Williams fails to make clear that the determination of primary meaning is itself arrived at only after a consideration of context.

appear a somewhat strained interpretation so as to avoid the undesirable effects of an excessively narrow interpretation. However the distinction is not without conceptual difficulties as is to be expected when an attempt is made to superimpose a clear-cut distinction on less than clear-cut data.

The concept of ordinary meaning then is perhaps the fairest guide to statutory meaning. But it is not as cut and dried as some judicial statements would have us imagine. It is a complex idea and as such its application gives rise to a number of problems. Criticism of the literal approach should perhaps be directed not to the fact that it embodies the concept of ordinary meaning but that it directs one to adopt the ordinary meaning of words. Such a direction belies the complexity of the phrase 'ordinary meaning' and of language generally. For a start, it is not always clear what in fact constitutes a word's ordinary or usual meaning. We have already noted that ordinary meaning is often equated with a word's 'core'. But due to the element of vagueness present in most words, there is often no clearly defined boundary between a word's core and its penumbra of fringe meanings. There will inevitably be occasional disagreement as to what the ordinary meaning of a word actually is. It is unfortunate that the phrase 'ordinary meaning' implies a simple either/or choice; either something is an ordinary meaning or it is not. For this reason some writers<sup>19</sup> prefer to talk of 'obvious' meaning.

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19. For example see Glanville Williams op.cit.p.1128. Also see N. MacCormick 'Legal Reasoning and Legal Theory' p.203. (footnote 7).

The latter term readily lends itself to description in terms of degrees of obviousness. Similarly, when equating ordinary meaning with core meaning it must be remembered that words will frequently have more than one ordinary meaning as the 'core' itself will often consist of several different senses.<sup>20</sup> To simply equate ordinary meaning with 'the dictionary meaning' of a word makes no sense. As Zander<sup>21</sup> points out, dictionaries usually give more than one definition for every headword. Driedger's view that the definition listed first is usually the 'ordinary meaning'<sup>22</sup> would be simplistic but for his recognition that context is the final determiner of ordinary meaning. But variations within dictionary definitions should not be regarded as an obstacle to the determination of ordinary meaning. Such variations arise from the habitual use of a word in different contexts and in relation to different subject matters. Through these variations context has already been accounted for in a general way. The specific statutory context will almost invariably clarify which particular sense of the word was intended. The point is not that only one ordinary meaning exists, but that only one may be appropriate given the particular statutory context and the circumstances of the case. In most cases there will be general, if not universal, agreement about which meaning is the one to be applied.<sup>23</sup> Consideration of relevant

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20. See p. 41 above.

21. M. Zander op. cit. p.50.

22. See p. 119 above.

23. See R. Cross. op. cit.

statutory context is thus indispensable to an accurate ascertainment of the legislative meaning.

A second point to note is that in certain cases the disputed words may have no 'ordinary' meaning. Technical terms, for instance, are to be interpreted in accordance with their assigned, technical meanings. Such words in most cases are readily recognised by the court and dealt with appropriately. Of more problem are 'terms of art'. According to Blackstone these must be "taken according to the acceptation of the learned in each art, trade and science."<sup>24</sup>

To summarise, statutes are a form of communication and as such need the element of objectivity which the ordinary meaning standard provides. But it must also be recognised that statutes are a special form of communication. To a large extent theirs is not an ordinary use of language but an extraordinary one. Firstly, language is not ordinarily used to circumscribe things so precisely. Statutes are continually defining; defining concepts, defining relationships, defining authority. Their concern is largely with the scope of these definitions, with their application to potential cases. Secondly, there is no simple relationship between an individual communicator and audience. The legislative process combines a large number of communicators with the largest audience in the particular jurisdiction. The size of the communicator raises all sorts of problems

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<sup>24</sup>. Blackstone's 'Commentaries' Vol.1.

about the nature of the legislative intent. These problems have been dealt with elsewhere.<sup>25</sup> The size of the audience raises problems concerning register. Ordinary meaning is the meaning bestowed on a word by habitual or customary usage by a particular speech community. But society is composed of a number of different speech communities each being composed of different social, professional, educational, racial and age types. Where legislation has fairly universal application, for example criminal legislation, which speech community, if any, is to be regarded as representative of the legislative audience as a whole? The chosen standard of speech should not correspond to 'slang' usage, nor should it correspond solely to the customary usage of the judicial community. The judiciary represents a minute proportion of the entire population and, as a group, their language use tends to lag behind that of society as a whole. Once again it may well be that an appropriate dictionary definition is the best guide to a word's 'standard sense'. Evidence of meaning so derived will of course be subject to contrary indications in the relevant statutory context. The purpose of a statute may require a broader interpretation than is to be drawn from a dictionary definition. A word may have an established meaning in a community and be so used in a statute before such meaning is adopted

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25. See MacCullum 'Legislative Intent' in *Essays in Legal Philosophy* edited by R.S. Summers discussed *infra*.



by lexicographers.<sup>26</sup> Where legislation is aimed at one particular group in society, for example legislation dealing specifically with the regulation of one professional group, then obviously the ordinary meaning of the statutory language should be taken as the ordinary meaning of that particular speech community. This has not always been done. It is only within the last few years that certain members of the judiciary have shown an awareness of the need to account for linguistic register. In the case of Maunsell v Olins<sup>27</sup> Lord Simon of Glaisdale displayed a more relative approach to ordinary meaning. He said:

"Statutory language, like all language, is capable of an almost infinite gradation of 'register' - i.e. it will be used at the semantic level appropriate to the subject matter and to the audience addressed (the man in the street, lawyers, merchants, etc.). It is the duty of a court of construction to tune in to such register and so to interpret the statutory language as to give to it the primary meaning which is appropriate in that register (unless it is clear that some other meaning must be given in order to carry out the statutory purpose or to avoid injustice, anomaly, absurdity or contradiction). In other words, statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances."

This point was emphasised yet again by Lord Simon in the passage already quoted<sup>28</sup> from the recent case of Stock v Frank Jones (Tipton) Ltd.<sup>29</sup>

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26. See American Jurisprudence Vol. 73 p.142 (2nd ed.)  
Also see comments on dictionary definitions in  
Part A pp. 84-87.

27. [1975] A.C. 373, 391E.

28. See p. 119 above.

29. [1978] 1 All E.R. 948.

The above recognition that ordinary meaning differs with audience and subject matter may fundamentally affect the ascertainment of ordinary meaning in many cases. Indeed, such recognition is vital if ordinary meaning is to be justified as a fair and accurate guide to meaning. But there are necessary limits to the application of a doctrine of semantic levels where a statute speaks with one voice to an audience consisting of all possible types. Lord Simon's recognition of "the man in the street" presumably contemplates some middle-of-the-road standard to be applied universally. The doctrine runs the risk of being potentially subversive if this is not accepted. At its most extreme it could arguably justify different sections of the community saying that the particular words used meant particular things to them. Closely related to such a notion of semantic levels is the notion of ordinary meaning consisting of various codes. A theory based on this notion is sometimes put forward by educationalists to justify the poor performance of working-class children in English schools.<sup>30</sup> The argument is that education is carried on through a medium of middle-class English and that children are assessed by their proficiency in this medium. Working-class children however may be used to a different code of speech and are thus disadvantaged educationally. Such a theory has obvious similarities to one of semantic levels. However whereas Lord Simon seems to have contemplated judicial recognition of register

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30. See Bernstein, 'Class, Codes and Control.'

in cases involving legislation clearly aimed at one professional or commercial group, the educationalists' theory extends this consideration of register to class differences. While theirs may be a fair criticism of educational technique, it would be a mistake to extend this idea of linguistic codes too far with regard to statutes. From a practical application point of view the problems involved would be tremendous. Besides which even the educational findings are far from being scientific data. It must also be remembered that statutory construction is circumscribed by maxims and presumptions which play no part in the everyday use of language. One such maxim is that ignorance of the law is no defence. Everyone is deemed to know the content of the law. Even if a statute is not addressed specifically to a particular person or group of persons they are on notice of it and subject to it. Such a maxim could prove difficult to reconcile with a full-blown theory of interpretation according to semantic levels.

Special problems then relate to the application of ordinary meaning as a standard of statutory interpretation. Statutes, we have seen, are a special form of communication with special functions to perform. This is not to deny that ordinary meaning is an appropriate starting point for interpretation. On the contrary, it is submitted that ordinary meaning provides the fairest guide to legislative meaning. We must not however expect simple straightforward results from a concept which does not itself possess these qualities. In practice, most

of these difficulties can be overcome by a proper consideration of statutory context.

The extent to which context is considered (or disregarded) as an integral part of the literal rule will be our next consideration. We have already discussed the need to consider context, including statutory purpose, in determining what is 'clear and unambiguous'.<sup>31</sup> We must now consider the extent to which context is in fact considered in the determination of ordinary meaning. This was touched upon at the beginning of this section. It is not difficult to find cases adopting an excessively narrow and isolationist approach to meaning.<sup>32</sup> No semantic justification exists for such an approach. Context alone clarifies meaning. But not all cases adopt such a restrictive line. Context is not always disregarded. Numerous modern cases reiterate that meaning is to be found only after a consideration of context; that statutes are to be read as a whole and meaning given to disputed passages only after such a reading. In America, a modern formulation of the 'plain-meaning rule' was stated in the case of Hutton v Phillips.<sup>33</sup>

" . . . interpretation involves far more than picking out dictionary definitions of words or expressions used. Considerations of the context and the setting is indispensable properly to ascertain meaning. In saying that a verbal expression is plain or unambiguous, we mean little more than that we are convinced that virtually anyone competent to understand it, and desiring fairly and impartially to ascertain its

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31. See pp. 36-42.

32. See for example Whiteley v Chappell (1868-9) 4 LRQB 147; Fisher v Bell [1961] 1 QB 394; and Bourne v Norwich Crematorium Ltd [1967] 2 All ER 576.

33. 45 Del. 156, 160, 70 A 2d. 15, 17 (1949).

signification, would attribute to the expression in its context a meaning such as the one we derive rather than any other; and would consider any different meaning by comparison strained, or far-fetched, or unusual, or unlikely . . . Implicit in the finding of a plain, clear meaning of an expression in its context (emphasis in original) is a finding that such a meaning is rational and "makes sense" in that context."

What then is a literal construction? We have already noted the wide diversity of opinion on this point.<sup>34</sup> On the one hand is the excessively restrictive view that words are to be considered in isolation and given their 'dictionary definition.' On the other hand are views such as that held by E.A. Driedger to the effect that literal meaning becomes apparent only after a consideration of context, use in context being that which gives a word its primary and usual sense.<sup>35</sup> Perhaps we must conclude that there are two quite distinct forms of literal approach. A formulation which includes context as an integral part in the determination of ordinary meaning would avoid many of the criticisms aimed at the more restrictive formulation. Whether it could avoid that criticism completely would depend on whether it gave sufficient regard to context.

The current recognition of context is seen by many as a modern development of the literal rule. In fact it would seem that context played a part in even its earliest formulations. We have seen that a strict approach to statutes was adopted as early as the fourteenth century. The concern of these early cases was primarily

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34. See pp. 117-119 above.

35. E.A. Driedger op.cit. p.2.

to stress the limits of the judicial interpretative function. Such cases advocated a strict approach rather than a literal one and, not surprisingly, no mention is made of the part played by context in determining what the statute said. However as early as 1388 in a case involving construction of the word 'distress'<sup>36</sup> it was agreed that the general words at the end of the statute must be limited by the particular words at the beginning. The present day doctrine of ejusdem generis can be traced back to this fourteenth century case. Admittedly the argument was in advance of its time. Nevertheless the case does illustrate an early awareness of the importance of context in determining the meaning of a particular statutory word.

It is unclear whether Tindal C.J. in the Sussex Peerage Case intended individual words to be considered independently of other words in the section or other section of the Act.<sup>37</sup> Certainly E.A. Driedger<sup>38</sup> argues that this was never his intention. In the Sussex Peerage Case itself, Tindal C.J. went on to say that "the words of the second section throw light upon and confirm the interpretation to be given to the first." And later in 1892, Lord Esher, M.R. in The Queen v The Judge of the City of London Court,<sup>39</sup> in referring to a previous case<sup>40</sup>

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36. Anon YB 12 7 13 Edw. III 51 (see T. Plucknett op.cit. p.41).

37. Compare on this point the comments of E.A. Driedger op.cit. pp.2-4 with those of R.Cross op.cit. p.44.

38. Ibid.

39. [1892] 1 QB 273. Ship

40. Brown and Sons v The Russian/Alina (1880) 42 L.T. 517.

which had based its conclusion on the reading of one section of an Act alone, said:

"If the learned judge meant to say that, when the meaning of general words is (if you look at them by themselves) clear, that determines their construction at once, even though from the context - from other parts of the same Act - you can see that they were intended to have a different meaning, if he meant to say that you cannot look at the context - at another part of the Act - to see what is the real meaning, then again I say he has laid down a new rule of interpretation, which, unless we are obliged to follow in the particular case, I would not follow." 41

Modern development of the literal rule lies not so much in the fact that context will be considered at all, but in the frequency and extent of that consideration. Early cases rarely went beyond a consideration of the Act itself. On the whole, modern cases adopting a literal approach also stop at a consideration of the Act as a whole. A few go further and consider "all the surrounding circumstances", including the statutory object. The decisions of Viscount Simonds and Lord Somervell in A.G. v Prince Ernest Augustus of Hanover<sup>42</sup> are significant for their recognition that a statute's object is to be considered in an initial determination of the ordinary meaning of a provision. The following often-cited passage is from Viscount Simonds' speech:

" . . . words and particularly general words, cannot be read in isolation, their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated

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41. [1892] 1 QB 273 at 290.

42. [1957] AC 436.

as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by these and other legitimate means discern the statute was intended to remedy." 43

At this point the boundaries between the various 'rules' or approaches become blurred and the inadequacy of their traditional categorisation is emphasised. The reason for Driedger's "one rule of statutory interpretation" becomes clear.

If one major criticism of the literal rule is that it is based on an oversimple view of language, another is that it is based on an oversimple view of the judicial function. This criticism can be taken in one of two ways. Firstly, it is arguable that some courts regard their function as too narrowly bound by the statutory words. The criticism is aimed at interpretation without regard for, or contrary to, the statutory purpose. Nowadays courts will usually interpret in accordance with statutory purpose where that purpose is discernible from the statute itself. Dispute arises where the purpose is not discernible from the statute. While some judges will go beyond the statute to discover the intention of Parliament, others consider their task as limited by the four corners of the act. The distinction between a narrow and a more liberal formulation of the literal rule is relevant here. While the criticism is valid with regard to the former, is it valid with regard to the latter?

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43. Ibid. p. 461.



Secondly, the criticism can be taken to mean that the literal rule does not give sufficient acknowledgement to the creative activity of the judges. Such activity is an inescapable part of the interpretation process<sup>44</sup>. It is difficult to analyse the validity of this criticism with regard to the broader formulation of the literal rule. This certainly adopts a more liberal approach to interpretation; the question is, does it adopt a more creative one? More often than not, consideration of context stops at a consideration of the Act as a whole. Basically the courts regard their task as one of cognitive exploration.<sup>45</sup> But cognition does not necessarily solve problems of the vague word or the borderline case. Sometimes the courts will go further and consider the statutory purpose as part of the overall context. When such a move is made beyond the statutory document to an articulation of policy, especially non-explicit policy, the court is moving more into the realm of creativity inasmuch as it provides a rational reconstruction of what that policy is. The extrinsic evidence exclusion rules limit the range of data available to the court in determining the true statutory purpose. With what little data they do have the courts rationally reconstruct the policy behind the act and impute this policy to Parliament. Their decision

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44. See p.242 below.

45. The terminology of R. Dickerson op.cit., has been adopted here. The judges' 'cognitive' function refers to the ascertainment of meaning, their 'creative' function refers to the assignment of meaning, or judicial lawmaking by analogy with the statute.

is then made according to this imputed intention.

Inasmuch as the court reconstructs the legislative policy and makes a decision on the basis of this policy, it acts creatively. But for reasons that will be discussed later<sup>46</sup> the courts rarely acknowledge that they do in fact make law, indeed policy. Criticisms concerning acknowledgement of judicial creativity are not limited to the literal rule.

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46. See pp.242-3 below.

## II. THE GOLDEN RULE

As we have seen, the golden rule presupposes an initial application of the literal rule. "The golden rule is that the words of a statute must prima facie be given their ordinary meaning."<sup>1</sup> Departure from the latter will only be allowed in certain circumstances. There is however no consistency in the terms used to express these circumstances. Some judges refer to 'absurdity',<sup>2</sup> some refer to 'repugnance'.<sup>3</sup> Closely linked to the latter term are the notions of 'anomaly',<sup>4</sup> and 'inconsistency'.<sup>5</sup> Some judges refer to 'inconvenience',<sup>6</sup> and some to 'injustice'.<sup>7</sup> Whereas the above characteristics are sometimes referred to simpliciter, at other times they are prefaced by an epithet such as 'obvious', 'great' or 'manifest'.<sup>8</sup> Clearly a reference to 'manifest absurdity' in a particular case is an example of absurdity. The question is, is this category restricted by necessary reference to the epithet? There is an ambiguity in the use of the term 'manifest'. With some judges the term is used synonymously with 'great'.<sup>9</sup> With others it

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1. Nokes v. Doncaster Amalgamated Collieries [1940] AC 1014, 1022.
  2. e.g. Grey v Pearson (1857) 6 HLC 106.
  3. e.g. Becke v Smith (1836) 2 M & W 191.
  4. e.g. Stock v Frank Jones (Tipton) Ltd. [1978] 1 AllER 948.
  5. e.g. Parker C.B. in Mitchell v Torrup (1766) Park. 227, 233.
  6. e.g. River Wear Commissioners v Adamson (1877) 2AC 743.
  7. e.g. Denver v Holmes 156 Colo. 586 cf. Whiteley v Chappell, LR 4 QB 149.
  8. e.g. Brown v The Russian Ship Alina (1880) 42 LT 517; The Queen v Judge of the City of London Court [1892] 1 QB 273; Becke v Smith loc.cit.
  9. See for example the use 'manifest absurdity' by Jessel M.R. in Brown v The Russian Ship Alina, loc.cit. See also the use of the term by Lord Esher in The Queen v Judge of the City of London Court loc.cit.

refers to something demonstrable or obvious and is manifest from the terms of the Act itself.<sup>10</sup>

The difference in terminology can be analysed in terms of a fact/value distinction. Fact judgements are based on empirical observation. They produce an impartial transcription of external realities. For example, the ascertainment of an inconsistency is a fact judgement since the inconsistency can be discerned from the terms of the Act. A value judgement on the other hand is based on factors such as worth, desirability and utility. The existence of these is not empirically observable but is ascertained subjectively. Thus, where a judge refers to 'absurdity' he seems to be making a value judgement linked closely with the reasonableness of the result.<sup>11</sup> Similarly, reference to 'inconvenience' or 'injustice' involves some evaluation of the consequences of a rule's application. 'Repugnance' seems to refer to an inconsistency or incompatibility within the Act, as do 'anomaly', 'incongruity' and 'illogicality'. The determination of their existence would therefore seem to be a factual matter determined by the content of the Act itself.

The fact/value distinction is sometimes put in terms of an objective/subjective distinction. Those decisions that involve an analysis of consequences are called subjective while those decided on a factual basis

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10. See for example the use of 'manifest absurdity' by Parke B. in Becke v Smith loc.cit.

11. For discussion of the meaning of absurdity see pp.140-1. below. Note that the Concise Oxford Dictionary defines 'absurdity' in terms of unreasonableness.

are called objective. But the comparison is not a perfect one. Generally speaking a subjective decision presupposes some element of evaluation. It is arguable however that not all evaluation is totally subjective. Indeed evaluation may connote a kind of psychological process - evaluative experience - or a kind of reasoning. The former is necessarily subjective, the latter is capable of being objective.<sup>12</sup> Nevertheless some legal writers and judges condemn an attempt to formulate legal rules or principles whose content is broad evaluation. Thus Judge Story, the great American jurist of the nineteenth century, noted in his treatise on the Conflict of Laws:

"Arguments drawn from impolicy or inconvenience ought to have little weight. The only sound principle is to declare *ita lex sculpta est*, to follow and to obey. Nor if a principle so just could be overlooked, could there be well found a more unsafe guide in practice, than mere policy and convenience. Men on such subjects complexionally differ from each other; the same men differ from themselves at different times. The policy of one age may ill suit the wishes or policy of another. The law is not to be subject to such fluctuations." <sup>13</sup>

In terms of the golden rule expressions of inconvenience, injustice and even absurdity are vulnerable to this criticism. However it is debatable whether Judge Story's fears are well grounded. Basically, judges are conservative valuers with a strong tradition of decision making in terms of reasonableness and justice. The above criticism could well be overstated. Nevertheless

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12. See Z. Najder 'Values and Evaluations' p. 173.

13. Story 'Conflict of Laws' p. 17. This passage is cited by Sir Fortunatus Dwarrris in his treatise on The Construction of Statutes (2nd ed). p. 597.

a recent analysis of 'absurdity' questions both the desirability and the historical accuracy of using that term to refer to the consequences of an interpretation. Expressing his argument in terms of the objective/subjective distinction, E.A. Driedger<sup>14</sup> attempts to equate absurdity with repugnance or inconsistency. Whereas subjective absurdity relates to consequence and is dependent on the opinions and values of the reader,<sup>15</sup> objective absurdity exists if what the legislature has said in one part of an Act clashes with what the same legislature has said elsewhere. In Driedger's opinion, only an objective absurdity justifies departure from the primary meaning of statutory terms. The test is "does the grammatical sense produce a result in one provision that is absurd in relation to another provision or in relation to the policy of the statute."<sup>16</sup>

The basis of Driedger's proposition is an argument as to the historical inaccuracy of using absurdity in its subjective sense to justify departure from ordinary meaning. He supports his case by decisions both prior and subsequent to the famous passage of Lord Wensleydale in Grey v Pearson,<sup>17</sup> but disregards the equally famous passage of Lord Blackburn in River Wear Commissioners v Adamson.<sup>18</sup> This he considers to be a misrepresentation of the existing state of law and totally ill-founded. His argument concludes with a statement of the golden

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14. E.A. Driedger, 'The Construction of Statutes'.

15. Ibid. p. 31.

16. Ibid. p. 131.

17. loc. cit.

18. loc. cit.

rule in entirely objective terms:

"if the grammatical and ordinary sense is not in harmony with the rest of the instrument then a less grammatical and less ordinary sense may be taken." 19

Sir Rupert Cross<sup>20</sup> takes a different view as to the meaning of 'absurdity'. In his opinion, absurdity does mean something wider than repugnance or inconsistency. It does cover absurd or unreasonable consequences.<sup>21</sup> While noting the strength of Driedger's argument, Cross concludes that there appear to be more dicta according to which an absurdity sufficient to justify a departure from the ordinary meaning of statutory words need not be 'in relation to the rest of the statute' than there are dicta to contrary effect.

It is submitted that Cross's conclusion is the preferable one. There are cases where external consequences have been held so unreasonable as to justify the adoption of some secondary meaning.<sup>22</sup> To note that Lord Blackburn misrepresented the golden rule in 1877 may be correct, but it does not nullify subsequent decisions which have adopted the wider meaning of 'absurdity'. It is too late to argue that the term should be restricted to internal inconsistencies.

It should be emphasised that the golden rule permits departure from ordinary meaning only where the statutory words are capable of bearing some secondary, less usual

19. E. A. Driedger op.cit. p.30.

20. R. Cross, 'Statutory Interpretation'.

21. Ibid. pp 81-84.

22. For example see Richard Thomas & Baldwins Ltd. v Cummings [1955] A.C. 321, 334-5. in which Lord Reid referred to "quite unreasonable results."

meaning. There must be some ambiguity or doubt as to meaning. In such a case the reasonableness of the consequences of alternative constructions will be a proper consideration in the assignment of meaning.<sup>23</sup> Absurd consequences have never justified departure from the obvious, unequivocal meaning of statutory words. But just as judges in borderline cases will sometimes disagree as to the ordinary meaning of words, so too they will sometimes disagree about the degree of doubt necessary to justify the adoption of a secondary meaning.<sup>24</sup> The matter is one for each individual judge to decide. As Lord Simonds has said:<sup>25</sup>

"Each one of us has the task of deciding what the relevant words mean. In coming to that decision he will necessarily give great weight to the opinion of others, but if at the end of the day he forms his own clear judgement and does not think that the words are 'fairly and equally open to diverse meanings' he is not entitled to say that there is an ambiguity. For him at least there is no ambiguity and on that basis he must decide the case."

It seems that ambiguity in the sense of a word having more than one meaning will not necessarily be enough. Lord Reid discusses this point in DPP v Ottewell.<sup>26</sup>

" . . . it only applies where after full inquiry and consideration one is left in real doubt. It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings. The imprecision of the English language, and so far as I am aware of any other language, is such that it is extremely difficult to draft any provision which is not ambiguous in that

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23. per Lord Reid in Gartside v Inland Revenue Commissioners [1968] A.C. 553 at 612.

24. See R. Cross op.cit. p.77.

25. In Kirkness v John Hudson & Co. Ltd 1955 AC 696 at 712.

26. [1970] AC 642 at p. 649.



sense. This section[s.37 of the Criminal Justice Act 1967] is clearly ambiguous in that sense, the Court of Appeal (Criminal Division) attach one meaning to it, and your Lordships are attaching a different meaning to it. But if after full consideration, your Lordships are satisfied, as I am, that the latter is a meaning which Parliament must have intended the words to convey, then this principle does not prevent us from giving effect to our conclusion."

Should the court, after a full consideration of the Act, decide that the words used by Parliament are clear and admit of only one meaning then that is the end of the matter. Unreasonable consequences arising from clear statutory words are the concern of Parliament and not the courts. As with all interpretation, the courts are bound by the clear words Parliament has used. These cannot be altered merely to conform with a judge's conception of what Parliament ought to have said. Lord Reid again stated this point clearly in IRC v Hinchy:<sup>27</sup>

"What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellants' contention. But we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not then we must apply them as they stand, however unreasonable and unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament. . . . One is entitled and indeed bound to assume that Parliament intends to act reasonably and therefore to prefer a reasonable interpretation of a statutory provision if there is any choice. But I regret to say that I am unable to agree that this case leaves me with any choice."

So too said Lord Greene in R.v Mohindar Singh:<sup>28</sup>

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27. [1960] AC 748 at 767-8.

28. [1950] AC 345.

"They (their Lordships) fully appreciate the importance of avoiding, so far as the words and context fairly and reasonably permit, a construction which would lead to . . . unreasonable results. On the other hand, it is to be remembered that the desirability of avoiding such results must not be allowed to give to the language used a meaning which it cannot fairly and reasonably bear. If the legislature has used language which leads to such results it is for the court to give effect to it. The function of the court is interpretation, not legislation. The limits thus imposed on the court prevent the twisting of words and phrases into a sense they cannot fairly and reasonably bear."

In Stock v Frank Jones (Tipton) Ltd Lord Simon of Glaisdale discusses what the court is doing in choosing between a primary and secondary meaning.<sup>29</sup>

"What the court is declaring is 'Parliament has used words which are capable of meaning either X or Y; although X may be the primary, natural and ordinary meaning of the words, the purpose of the provision shows that the secondary sense, Y, should be given to the words.' So too when X produces injustice, absurdity, anomaly or contradiction. The final task of construction is still, as always, to ascertain the meaning of what that draftsman has said, rather than to ascertain what the draftsman meant to say. But if the draftsmanship is correct, these should coincide. So that if the words are capable of more than one meaning it is a perfectly legitimate step in construction to choose between potential meanings by various tests (statutory, objective, justice, anomaly etc.) which throw light on what the draftsman meant to say."

Thus we have seen that the consequences of a particular interpretation are relevant in determining which of the competing meanings of a word or phrase is the one that ought to be applied. We have also seen that where the meaning of words is clear and unambiguous the consequences of their application are of no concern

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29. [1978] 1 All E.R. p. 948 at p. 953.

to the court. Does this mean that in the latter case consequences are not considered at all? It is submitted that this is not the case. In the following passage Sir Fortunatus Dwarriis attempts to reconcile consideration of consequence with dicta that judges are to construe words according to their clear and grammatical sense without regard for the consequences which may stem from their interpretation:

"The answer is, that in the act of construction, and during the period and gestation of interpretation, the consequences of any particular exposition, will be most unexceptionably, and properly, considered and weighed, for the sake of avoiding absurdity; but that after the court has arrived at a determinate conclusion, what is the fit construction that the meaning and context require them to put upon an act of Parliament, the Judges have nothing to do with the consequences of their decision. In Reg. v The Justices of Lancashire (11 AeE 157), Patterson, J. said, 'I cannot tell what consequences may result from the construction which we must put upon the statute; but if mischievous, they must be remedied by the Legislature'. In Rhodes v Smethurst (4Mec & W 63), Lord Abinger said 'A court of law ought not to be influenced or governed by any notions of hardship: cases may require legislative interference, but Judges cannot modify the rules of law.' In Hall v Franklin (3M & W 259), Lord Abinger said: 'We have been strongly pressed with the inconveniences that may result from this construction of the statute. We are not insensible to them; but the only proper effect of that argument, is to make the Court cautious in forming its judgement; we cannot on that account put a forced construction upon the act of Parliament.'" 30

Interpretation in such cases could perhaps be described as 'reflexive interpretation.'<sup>31</sup> The unreasonableness of a proposed construction puts the court on notice that it is to be on the look out for some secondary

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30. Sir Fortunatus Dwarriis in his treatise on the construction of statutes. p. 595.

31. Cf. reflexive equilibrium in John Rawls, 'Theory of Justice.'

meaning that the words can bear and which would avoid the absurdity. Thus, for example, Lord Reid said in Courts & Co. v IRC:<sup>32</sup>

"In general, if it is alleged that a statutory provision brings about a result which is so startling, one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results."

No judge could help but think of the practical application of the statute under his consideration.<sup>33</sup> Lord Denning has admitted to considering specific instances in attempting to understand a statute.<sup>34</sup> Should quite unreasonable consequences adhere to a proposed construction the judge would reconsider the Act to see if the legislature actually said what at first sight it appears to have said.<sup>35</sup> He would be on guard for some latent ambiguity within the act. In effect, the judge reinterprets the statutory provision. If further consideration of the act reveals no doubt as to meaning then the alleged Parliamentary intention is conjecture only and ought not to be adopted.

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32. [1953] AC 267 at p. 281.

33. E.A. Driedger op.cit. p.66.

34. See Lord Denning in Escoigne Properties Ltd v IRC [1958] 1 All ER 406 at p. 414.

35. See e.g. Lord Reid in Hartnell v Minister of Housing and Local Government [1965] AC 1134 at p. 1157.

### III. THE MISCHIEF RULE

The mischief rule, as laid down in Heydon's Case, embodies both historical and purposive approaches to interpretation. Thus we have seen it resembles two French approaches, 'l'interprétation historique' and 'l'interprétation téléologique'.<sup>1</sup> The former corresponds to the historical approach in that it seeks to ascertain Parliamentary intent by reference to the historical background of the legislation. The latter is of somewhat wider scope than the purposive approach and is perhaps closer to the equity of the statute idea.<sup>2</sup>

Several Commonwealth countries have embodied the purposive approach in statutory form.<sup>3</sup> But the desirability of such statutory enactments is debatable.<sup>4</sup> F. Bennion calls such provisions "a statement of the obvious",<sup>5</sup> which he regards as unnecessary when the Act is clear and unhelpful when it is not. Certainly New Zealand's Section 5(j) has not been utilised to the extent that one might expect. Nevertheless the English and Scottish Law Commissions favoured the adoption in the United Kingdom of an approach promoting the "general legislative purpose" and included a provision to that effect in its proposed draft. Such a clause was also included in Lord Scarman's recent Interpretation Bill. But whatever else the Lords thought of the Bill, they

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1. See J.H. Farrar, 'Introduction to Legal Method' p.96 for discussion of these French approaches.

2. Ibid. p.97.

3. For example, New Zealand's Section 5(j). For discussion of this and other such sections see pp.167-170.

4. See p.219.

5. F. Bennion 'Statute Law', p. 81.

certainly regarded this provision as unnecessary.<sup>6</sup>

Heydon's Case was decided in 1584 and although it continues to be cited today the question arises of its relevance to modern society. Perhaps most immediately obvious is the archaism of its language. The Law Commissions were very aware of this and favoured a draft provision expressed in terms of 'general legislative purpose' rather than 'mischief', a term they regarded as having an archaic ring to the layman.<sup>7</sup> Furthermore, they considered the word 'mischief' to suggest that legislation is only designed to deal with an evil and not to further a positive social purpose.<sup>8</sup> The Law Commissions' reservations were perhaps groundless. All legislation arises because its promoters consider the existing law to contain some defect or inadequacy.<sup>9</sup> And however laudable their concern for the layman might be, it is doubtful whether a layman would ever read an Interpretation Act; lawyers on the other hand know precisely what 'mischief' means.

A more important criticism is the allegation that, in its original form, the mischief rule reflects a different constitutional balance than would now be acceptable.<sup>10</sup> This can be regarded in either one of two ways. Firstly, it can refer to the doctrine of separation of powers which developed later. Alternatively it could refer to the relationship between common law and statute as the

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6. See House of Lords debate 13th February 1980, Col. 276-306.

7. See Law Com. No. 21 p. 49 n. 177.

8. Ibid.

9. F. Bennion op. cit. p.88.

10. See Law Com. No. 21 p. 19.

primary source of law in fact. Heydon's Case assumes statute law to be subsidiary and supplemental to the existing common law.<sup>11</sup> Dwarrris in his treatise on the Construction of Statutes notes that from earliest times common law had been regarded as "the perfection of reason" and the "best birthright and noblest inheritance of the subject."<sup>12</sup> It is not surprising that in Heydon's Case the first step was to consider the existing rule at common law. As Coke said,

"to know what the common law was, before the making of the statute, whereby it may be seen whether the statute be introductory of new law, or only affirmative of the common law, is the very lock and key to set open the windows of the statute." <sup>13</sup>

Indeed, statutes were to be construed by reference to the principles of common law,<sup>14</sup> for it was presumed that Parliament did not intend to change the common law any further than was expressly provided for. In fact, the best interpretation was to construe a statute as near to the rule and reason of the common law as possible, and by the course which the common law observes in other cases (1 P. Wms. 252; 2 Inst. 148, 307; 1 Sand 240).

Thus, Dwarrris notes,<sup>15</sup> when a statute alters the common law the meaning is not to be strained beyond the words except in cases of public utility. Similarly, if a statute makes use of a word, the meaning of which is well known and definite at common law, the word is to be expounded and received in that same sense.

11. Ibid. p.20.

12. See Sir. F. Dwarrris 'On the Construction of Statutes' p. 564.

13. 2 Inst. 301; 3 Rep. 31; 13 Hob. 83.

14. See F. Dwarrris op. cit. p. 564.

15. Ibid. p. 565.

The presumption against alterations in the common law continues today,<sup>16</sup> but carries less weight. It is perhaps strongest in cases involving vested rights. The legislature has assumed a much larger function as a source of law; a development largely from the nineteenth century onwards and corresponding with the growth of departments of state and the civil service. The volume of legislation has increased vastly since the time of Heydon's Case and covers subjects not touched upon by the common law, for example. bankruptcy, town planning, social welfare and revenue law. A direction to consider the existing common law is often irrelevant. In such cases 'common law' would be better replaced by 'pre-existing statute law'. Or perhaps the old practice of regarding some ancient statutes as part of the common law could be extended to cover all statutes.

Heydon's Case fails to lay down any clear test as to the significance of the actual words used by Parliament. Later authorities seem rather confused on this point. Sir F. Dwarrris made the following comments in his consideration of the means by which a court is to determine the intention of Parliament:<sup>17</sup>

"As a primary rule, (the intention of Parliament) is to be collected from the words; when the words are not explicit, it is to be gathered from the occasion and necessity of the law, the defect in the former law and the designed remedy; being the causes which moved the legislature to enact it."

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16. See 'Maxwell on the Interpretation of Statutes' (12th ed.). p.116.

17. F. Dwarrris op. cit. p. 562.



The mischief rule was only to be applied in cases of ambiguity to resolve that ambiguity.<sup>18</sup> Where the statutory words were clear and unambiguous effect was to be given to them. A similar approach was adopted by Tindal, C.J. in the Sussex Peerage Case; only if doubt arises from the terms used is "the ground and cause of the making of the statute" to be called in aid in its construction. Both of these statements can be compared with that of Parke B. in the nineteenth century case of Lyde v Bernard.<sup>19</sup> Here Parke B. seems to be suggesting that the mischief can modify even plain words:

"I admit that words may be construed in a sense different from their ordinary one when the context requires it, or when the act is intended to remedy some existing mischief, and such a construction is required to render the remedy effectual. For we must always construe an act so as to suppress the mischief and advance the remedy."

The apparent contradiction between the approaches is nowadays resolved by Lord Simon's speech in Maunsell v Olins<sup>20</sup> and his two-tiered approach to interpretation. A conflict between the statutory purpose and what would otherwise appear to be the plain meaning of words may arise in Lord Simon's initial stage of interpretation. Arguably, such a conflict would operate in a similar way to the 'reflexive interpretation' situation discussed

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18. Cf. the American position as stated in Vol. 73 American Jurisprudence 2d p. 361; the mischief approach is applied in the construction of ambiguous statutes. See for example: US v Champlin Refining Co. 341 US 290 95 LEd 949 71 S Ct 715; Apex Hosiery Co. v Leader 310 US 469, 84 LEd 1311, 60 S Ct 982; Hennessey v Walker 279 NY 94, 17 NE 2d 782, 119 ALR 1029; Sun Shipbuilding & Dry Dock Co. v Unemployment Comp. Bd. of Review 358 Pa 224, 56 A2d 254.

19. 1 M & W 113.

20. Quoted above at pp. 115-116.

above in relation to the golden rule. It would put the court on guard to look for ambiguities in the legislative text. The court must presume that Parliament intended to enact provisions consistent with the legislative purpose. In this respect the mischief and golden rules are related. The absurd or repugnant results that lead a court to depart from the primary meaning of words are 'absurd' or 'repugnant' for the very reason that they are inconsistent with the supposed legislative intention. Presumably with this in mind the English and Scottish Law Commissions have stated that the golden rule "on closer examination turns out to be a less explicit form of the mischief rule."<sup>21</sup> It is now clear, therefore, that the "ground and cause of the making of the statute" is referred to before deciding whether the statutory words are clear and unambiguous. The mischief rule has thus insinuated itself into the literal rule.<sup>22</sup>

It is alleged by some writers that the courts at the time of Heydon's Case took much greater liberties with the actual words of the statute than would be permissible today.<sup>23</sup> Their approach was rationalised as the equity of the statute approach by Tudor lawyers. In fact, Heydon's Case represented a limitation of this freedom. Concentration was on the spirit of the statute but not necessarily at the expense of the letter. It is arguable that the extent of this earlier freedom is

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21. Law Com. No. 21 p. 19.

22. R. Cross op.cit. p. 170.

23. See for example E.A. Driedger in 'The Construction of Statutes'. We have already mentioned this point briefly in the History section above.

sometimes overstated and the limitations imposed by Heydon's Case unnoticed. Prior to this case the courts were prepared to take greater latitude in the interpretation of statutes when these were "ill pend".<sup>24</sup> This latitude in interpretation was to correct obvious drafting errors. It would be a mistake to infer that this approach was very common, the impression given by Driedger.<sup>25</sup> It is fallacious to argue that because there are some examples and these can be described as involving old statutes, that the judges in the interpretation of old statutes adopted such an approach. It is interesting that Driedger seems to rely for this part of his book on J.A. Corry, whose wide-ranging article is reproduced in his appendix. Be that as it may, it is certainly true that modern examples of courts tampering with the letter of a statute in pursuit of the spirit are few and far between. Courts today regard themselves as more confined by the actual words used. They regard their function as primarily, almost exclusively, circumscribed by those words.

In essence, the mischief approach enjoins a court to look to the object or purpose of an act and to construe doubtful passages in accordance with that purpose. At the time of Heydon's Case the "four-corners" rule prevailed. As Lord Diplock explains in Black Clawson, when the mischief rule was first propounded the judges needed to look no further than the Act itself:

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24. To use the words of Coke's 'Institutes'. For example, the Statute of Gloucester (6 Edw.1, c.11) referring to London was held to have intended to include all cities and boroughs equally, London having been named simply for pre-eminence - Cokes Institutes Vol.1, pt.2, p.322.

25. See E.A. Driedger op.cit. p.58.

"Statutes in the sixteenth century and for long thereafter in addition to the enacting words contained lengthy preambles reciting the particular mischief or defect in the common law, that the enacting words were designed to remedy. So, when it was laid down, the 'mischief' rule did not require the court to travel beyond the actual words of the statute itself to identify 'the mischief and defect for which the common law did not provide', for this would have been stated in the preamble. It was a rule of construction of the actual words appearing in the statute and nothing else. In construing modern statutes which contain no preambles to serve as aids to the construction of enacting words the 'mischief' rule must be used with caution to justify any reference to extraneous documents for this purpose."<sup>26</sup>

Today, evidence of purpose is not always apparent from the face of the Act. Adoption of a purposive approach raises the question of how far beyond the Act the court can go in determining what that purpose is. Lord Diplock's passage illustrates the hesitance with which some courts approach extrinsic materials. By no means all are permitted as evidence of Parliamentary intention. The reasons for and consequences of this rule of exclusion will be discussed fully below. It only remains here to say that the effectiveness of the mischief rule, and indeed of the various statutory enactments of a purposive approach, depend greatly on the availability of reliable evidence of legislative policy.

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26. Black Clawson [1975] AC 591 at 638.

## CHAPTER X

## THE CANONS: MODERN ACADEMIC REFORMULATION

An examination of the traditional canons shows that they basically embody two approaches to interpretation, literal and purposive.<sup>1</sup> The golden rule contains aspects of both but essentially adopts a literalist approach. The history of our law on interpretation of statutes really consists of a battle between these two rival schools of thought.<sup>2</sup> Both approaches purport to give effect to the intention of Parliament. The difference lies in the means by which they ascertain this supposed intention. The literalist school stresses the statutory words. These are the vehicle used by Parliament to express its intention and, where these words are clear, effect must be given to them. The purposive school, on the other hand, may look beyond the words to what Parliament meant to do. It then seeks to give effect to the object or purpose of the legislation. Changes have occurred in both approaches as judges become increasingly aware of the importance of context in ascertaining meaning. And with these changes the once diverse approaches begin to merge. The ordinary meaning

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1. This is quite different from the distinction between strict and liberal interpretations. A literal interpretation need not give rise to a narrow or strict interpretation; nor does a purposive interpretation necessarily give rise to a liberal one.
  2. See Lord Hailsham LC in House of Lords Deb. 13th Feb. 1980 Cols. 301-2.

of words will now be determined only after the statute has been read as a whole in its appropriate context. The purpose or object of a statute is now commonly regarded as part of that appropriate context. It is a small step to argue that ordinary meaning must accord with statutory purpose. This of course differs from the view adopted in Sussex Peerage, and still held by some today,<sup>3</sup> that consideration of the statutory purpose only becomes relevant if the statutory words are 'unclear.' This view is to be contrasted with that of Lord Simon in Maunsell v Olins who makes it clear that purpose is relevant at a more fundamental stage; that of deciding whether the statutory words are in fact clear at all.

The great difficulty experienced today in reconciling judicial statements on interpretation arises because these can no longer be pigeon-holed into three isolated categories (subject of course to the comments already made concerning the golden rule). To attempt to do so only gives rise to confusion. The three 'approaches' are relevant only from their historical perspective. Some modern academics have recognised this change and have attempted a reformulation of the rules of interpretation. We will consider two such reformulations, those of E.A. Driedger and R. Cross.

Driedger's thesis accords with what has already been said, that the literal, golden and mischief approaches no longer exist as separate entities; in his view they

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3. For example see Lord Dilhorne in House of Lords Deb. 13th Feb. 1980. Col. 298.

merely express different aspects of the same process.<sup>4</sup>

There is now only one approach to interpretation claims Driedger. The words of an act are to be read in their grammatical and ordinary senses and harmoniously with the scheme of the act, the object of the act and the intentions of Parliament.<sup>5</sup> This approach is essentially a literal one, but literal in total context, Consideration of context becomes an integral part of ascertaining the literal meaning of words; words only acquire this meaning through their use in specific contexts. In detail, the steps to be followed in interpreting a particular provision are as follows:

- "1) The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressing or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
- 2) The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.
- 3) If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are unreasonably capable of bearing, is to be given them.
- 4) If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute or statutes in pari materia, then a less grammatical or less

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4. See E.A. Driedger 'The Construction of Statutes' pp. 61-62.

5. Ibid. p. 67. Judicial expression of this principle is to be found in Victoria City v Bishop of Vancouver Island [1921] AC 384 per Lord Atkinson p. 387.

ordinary meaning that will produce harmony is to be given the words if they are reasonably capable of bearing that meaning.

- 5) If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected . . . " 6

Sir Rupert Cross, in his book 'Statutory Interpretation', supports Driedger's contention that the three traditional canons have been fused.<sup>7</sup> He does not however accept Driedger's reformulation of the golden rule<sup>8</sup> and on this Cross's view has been preferred in Chapter IX. According to Cross the common academic practice of treating cases as illustrations of one or more of these three canons is not supported by the authorities. Rather, it is now an accepted fact that

"the 'grammatical and ordinary sense of the words' means those senses after due allowance has been made for the context. The 'context' includes the object of the statute. The 'mischief' rule has insinuated itself into the literal rule. 'Some absurdity' is broader than 'some repugnance or inconsistency with the rest of the instrument'; it includes a construction which leads to 'quite unreasonable results'." 9

In his attempt to reconcile the authorities, Cross sets out ~~what~~ he considers to be the basic rules of interpretation:

- "1) The judge must give effect to the ordinary, or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.
- 2) If the judge considers that the application

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6. Ibid. pp. 81-82.

7. R. Cross 'Statutory Interpretation' p. 169.

8. Ibid. p. 169.

9. Ibid. p. 170.



of the words in their ordinary sense would produce an absurd result which cannot reasonably be supposed to have been the intention of the legislature, he may apply them in any secondary meaning which they are capable of bearing.

- 3) The judge may read in words which he considers to be necessarily implied by words which are already in the statute and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible or absurd or totally unreasonable, unworkable or totally irreconcilable with the rest of the statute.
- 4) In applying the above rules the judge may resort to (various aids to construction and presumptions)." 10

It is submitted that the above reformulations are preferable to the traditional three-fold statement of the rules of statutory interpretation. Their recognition of the essential role of context and of the interrelation between the various approaches has much to recommend it from a linguistic point of view. Moreover, as we shall see in Part C, they more accurately reflect current judicial practice than does the old categorisation.

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10. Ibid. p. 43.

## CHAPTER XI

## THE PRESUMPTIONS

Quite apart from the canons of construction discussed above, the final decision of a court may be greatly influenced by various presumptions of intent.<sup>1</sup> The juridical nature of presumptions has been discussed above.<sup>2</sup> It may be concluded that no one analysis can be stated with complete accuracy due to the great diversity of individual presumptions. Bearing this in mind it may be noted that the presumptions in some way point to a presumed Parliamentary intention, that is, an attributed intention. E.A. Driedger has called the presumptions "external sources of Parliamentary intent."<sup>3</sup> More accurately they are external sources of continuing Parliament intent as they are rebuttable by the express words of the statute. Thus whatever label we care to refer to them by, presumptions always relate in some way to the burden of proof.<sup>4</sup> Legislation is made within a framework of social and economic values which, in the absence of an express indication to the contrary, it is assumed Parliament intended to respect.<sup>5</sup> Hart and Sacks have equated presumptions with principles of social relations and have called them "a distillation of the experience and wisdom of the society."<sup>6</sup> As social values

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1. See Law Com. No. 21 p.21.

2. See p.97.

3. E.A. Driedger 'The Construction of Statutes' p.137.

4. R. Cross 'Statutory Interpretation' p.142.

5. Law Com. No. 21 p.21.

6. H. Hart (Jr) & A. Sacks 'The Legal Process' (tentative edition) p.1240.

change, so too will particular presumptions, even to the extent of being totally abandoned by the courts.<sup>7</sup>

Many presumptions are applied almost unconsciously in the process of interpretation. Such presumptions embody fundamental principles of communication and the legal system. They apply even where there is no question of linguistic ambiguity. R. Cross<sup>8</sup> has called them "presumptions of general application". The principles they embody are illustrated in detail in various of the more specific presumptions. The presumption of normal usage would be one such presumption of general application.<sup>9</sup> It is presumed that the author of a document has followed the established conventions of language to him and his audience. More specifically, that he has used his words in senses normal or usual for the subject to which the statute is addressed.<sup>10</sup> A further basic presumption is that a statute has a single true meaning which approximates with the legislative intent.<sup>11</sup> Hart and Sacks identify yet another such presumption; that the court "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."<sup>12</sup> They add that the court should also "presume conclusively that these persons, whether or not entertaining concepts of reasonableness shared by the courts, were trying

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7. Law Com. No. 21 p.21.

8. R. Cross op.cit. p. 143.

9. See R. Dickerson 'The Interpretation and Application of Statutes', p. 223.

10. Compare this with general question of linguistic register - see above pp

11. R. Dickerson op.cit. p.225.

12. Hart & Sacks op.cit. p.1415.

responsibly and in good faith to discharge their constitutional powers and duties."<sup>13</sup> We could call this a presumption of reasonableness and fidelity to duty.<sup>14</sup> A final illustration is one peculiar to prescriptive documents; that the legislature has taken account of the rest of the legal order and has tried to integrate the statute with it fairly and rationally.<sup>15</sup>

The general body of presumptions is expressed in far more detail than those above. They can be broadly classified into two groups; those relating to form and those relating to substance. The former relate to questions of language, grammar, syntax and logic. The latter are more specifically 'legal' in nature. All are devised for application in the doubtful case. While giving illustrations of the two categories, it is in no way proposed to give a full account of their contents. This has been done more than adequately elsewhere.<sup>16</sup>

The presumption of formal consistency<sup>17</sup> falls under the first head. It is presumed that the draftsman has not varied his terminology unless he has changed his meaning and vice versa. Obviously the strength of this presumption will vary greatly from case to case, bearing more weight where the statute as a whole appears to have been carefully drafted and is generally consistent in language, arrangement and punctuation.<sup>18</sup> Likewise there

13. Ibid. p.1415.

14. R. Dickerson, op.cit. p.226.

15. See E. Crawford 'The Construction of Statutes' Ch.XXII (1940 - St. Louis).

16. See for example discussion of the presumptions in 'Maxwell on the Interpretation of Statutes'.

17. See E.A. Driedger op.cit. pp. 74-75.

18. R. Dickerson op.cit. p. 225.

is the presumption that one part of the statute is not intended to contradict another part of the same statute.<sup>19</sup> This presumption R. Dickerson notes to be based on the observed fact that inconsistency almost always frustrates rather than advances human purposes. It is therefore rooted in an even more basic presumption, that the statute expressed an immediate, coherent purpose that in turn implements broader or more remote purposes.

Principles such as *eiusdem generis*, *noscitur a sociis*, *expressio unius est exclusio alterius* and *generalia specialibus non derogant* have sometimes been classified under the general linguistic presumption that words take meaning from the context.<sup>20</sup> It is doubtful whether they should be classified as presumptions at all - Bennion calls them maxims and distinguishes them from presumptions.<sup>21</sup> According to him they embody canons of construction applicable to any type of prose and are based mainly on logic.<sup>22</sup> However classified, it is clear that they are neither legal rules nor legal principles. More probably they are general rules of language, although R. Cross points out that it is hardly even correct to label them thus.<sup>23</sup> To him they simply refer to the way in which people speak in certain contexts and are no more than 'rough guides' to the intention of the speaker or writer.

19. Ibid. p. 224.

20. See for example M. Zander 'The Law-Making Process', p. 83.

21. F. Bennion 'Statute Law' pp. 83, 84.

22. Ibid. p. 83.

23. R. Cross, *op.cit.* p. 115.

Finally there are presumptions which relate to the substance of legal rules. There is the presumption against interference with vested rights. And as a particular facet of this, there is the presumption that an Act should not be given retrospective effect. There is the presumption that jurisdiction of the court should not be ousted, that an Act should accord with international law and treaty obligations and that there should be no crime without a guilty mind. Numerous other examples could be given. Many of these presumptions are subject to exceptions. For instance, where an Act is declaratory in nature, the presumption against construing it retrospectively is inapplicable.<sup>24</sup> Many conflict with each other in relation to particular enactments. Even the content of some is doubtful today; is it necessarily beneficial to modern society that taxing statutes be strictly construed?<sup>25</sup>

Perhaps the principal criticism of presumptions as a guide to interpretation is that the courts are in no way effectively bound by them.<sup>26</sup> The Report of the Law Commissions sets out four reasons for this :

- "(a) There is no established order of precedence in the case of conflict between the different presumptions.
- (b) The individual presumptions are often of doubtful status or imprecise scope.
- (c) A court can give a decision on the meaning of a statute which conflicts with a particular presumption without referring to presumptions of intent at all. The possibility for the court to decide in the first place that the meaning is clear enables it to exclude

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24. See 'Craies Statute Law' (1971) p.387.

25. See F. Bennion op.cit. p. 85.

26. Law Com. No. 21 p.21.

- altogether any operation of a presumption.
- (d) There is no accepted test for resolving a conflict between a presumption of intent, such as the presumption that penal statutes should be construed restrictively, and giving effect to the purpose of a statute (the 'mischief' of Heydon's Case), for example, the purpose of factory legislation to secure safe working conditions." 27

Note that in relation to this last point, Cross has questioned whether the possibility of conflicting presumptions (leaving aside that for strict construction of penal statutes) presents any great practical difficulties.<sup>28</sup> He also notes that the presumptions could not be arranged in any hierarchy because their strength is so largely dependant on the particular facts of each individual case.<sup>29</sup> They are merely 'pointers' to a conclusion, not rules obliging a judge to reach a certain conclusion.

If merely 'pointers' to a particular intention, then the question arises of how the traditional canons of construction differ in status from the presumptions. They are not rules and in no way bind a judge to follow them. They are merely approaches to interpretation which have been adopted from time to time with more or less judicial approval. They too have been described as 'pointers' to statutory meaning.<sup>30</sup> Bennion has in fact described the literal, golden and mischief approaches in terms of presumption.<sup>31</sup> The only distinction between the two is somewhat subtle and relates to their non-application.

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27. Ibid. p. 22.

28. R. Cross, op.cit. p. 144.

29. Ibid. p. 144.

30. See Lord Reid in Maunsell v Olins [1975] AC 373, 382.

31. F. Bennion op.cit. p. 84.

While presumptions are generally said to be rebuttable by clear evidence that a contrary intent applies, it is a rather strained use of language to refer to a canon being 'rebutted' in this way. Rather, a court simply chooses not to apply a particular canon or canons largely because of its own view as to what best accords with the Parliamentary intent.



## CHAPTER XII

## SECTION 5(j) AND ITS RELATIONSHIP WITH THE CANONS

Section 5(j) of the Acts Interpretation Act 1924 is often said to be legislative enactment in modern language of the mischief approach.<sup>1</sup> It provides as follows:

"Every Act, and every provision or enactment thereof, shall be declared remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit."

The origin of the particular wording is obscure. It appears to have been taken from the Canadian Revised Acts 1886 c. 1 s. 7. Some of the wording resembles some Canadian cases on construction of constitutional law but surprisingly there is no Canadian literature on it, although in a slightly revised form it is still contained in s.11 of the Federal Interpretation Act 1967-68 c.7. The Canadian Abridgement makes no reference to it and there is no discussion in E.A. Driedger's 'Construction of Statutes'.

The section originally appeared in New Zealand in the Interpretation Act 1888 section 5(7). It was re-enacted in section 6(1) of the Acts Interpretation Act 1908 and then in 1924 as section 5(j).

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1. See for example D.A.S. Ward in his article 'A Criticism of the Interpretation of Statutes in New Zealand Courts' [1963] NZLJ 293 at 294.

In its terms the section abolishes the old distinction between remedial and non-remedial legislation by deeming all legislation to be remedial. The significance of this was that at common law remedial statutes were to be construed liberally, whereas certain other statutes, such as penal and taxing statutes, were to be strictly construed. The section then goes on to use rather tautologous language reminiscent of a North American constitution when it states that every Act shall receive "such fair, large and liberal" construction as will best assure the attainment of its object. To this extent section 5(j) adopts a purposive approach. Professor J.F. Burrows<sup>2</sup> has mentioned that whereas it is easy to see that "fair" means something different from "large and liberal", it is not easy to see a difference between "large" and "liberal" which are synonyms. This direction to give a "large and liberal" interpretation he considers to be an injunction to give words a sense other than their most natural one where this is necessary to effectuate the statutory or provisional object.<sup>3</sup> The word "fair" probably refers to the construction of the relevant provision and not to the result of the construction.<sup>4</sup> In other words it merely emphasises that a court must not put a meaning on the words of a section which those words cannot reasonably bear. The section ends with a reference to

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2. In his article 'The Cardinal Rule of Statutory Interpretation in New Zealand' [1969] 3 NZLR 253.

3. Ibid. p. 266.

4. See Wilson, J. in Union Motors Case [1964] NZLR 146 at 150.

the attainment of the object of the Act or provision in accordance with its "true intent, meaning and spirit." Again, this final wording is largely tautologous. It is clear, however that one must start by discovering the statutory object and then interpret all doubtful words so as to conform with that object.

Section 5(j) has been on the statute book for nearly one hundred years, yet its effect on the interpretation of statutes in New Zealand is very conjectural. Professor Burrows has identified two high tides, 1910-1920 and the 1960's, when the section has been applied more regularly. While compiling the survey contained in Part C of this thesis, the impression was left that, while Section 5(j) was not necessarily cited frequently, the principles embodied in that section were probably in the minds of the judges. To this extent the section could well be regarded as an attempt to give definitive expression in statutory form of the correct judicial approach. The cases in which the section has been considered are fully dealt with elsewhere<sup>5</sup> and it is unnecessary to repeat the analysis here.

As Haslam, J. has pointed out,<sup>6</sup> the section offers no assistance until the intention of the legislature has first been ascertained. It is silent on the question of what extrinsic evidence, if any, is permissible to determine this intention. In this respect section 5(j)

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5. See J.F. Burrows op.cit.

6. In Nunns v. Licensing Control Commission [1967] NZLR 76 at 78.

should be compared with section 19 of Ghana's Interpretation Act which attempts to meet this deficiency.

Section 19 reads as follows:

- "(1) For the purpose of ascertaining the mischief and defect which any enactment was made to cure and as an aid to the construction of the enactment a court may have regard to any textbook or other work of reference, to the report of any commission of inquiry into the state of the law, or any memorandum published by authority in reference to the enactment or to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the Assembly.
- (2) The aids to construction referred to in this section are in addition to any other accepted aid."

The relationship of section 5(j) to the traditional common law approaches to interpretation is also obscure. The influence of English textbooks with their exposition of these traditional approaches has certainly been a conservative influence on New Zealand judges in the past. The common law approaches all seem to continue to exist although it is arguable that section 5(j) should have priority by reason of its legislative character. A possible argument that it is not a proper subject for legislation is really off the point. Impropriety per se does not invalidate legislation.

## CHAPTER XIII

INTERNAL AND EXTERNAL CONTEXT AND  
THE EXTRINSIC EVIDENCE EXCLUSION RULE

## I. INTRODUCTION

A recurring theme has appeared throughout this thesis; that without proper regard for context the courts cannot hope to make an accurate appraisal of statutory meaning. The relevance of statutory context is not necessarily a ground for its legal admissibility, however. The common law rules governing the admissibility of statutory context as evidence of the legislative intention are often irrational and incoherent. To some extent the New Zealand Acts Interpretation Act has improved upon the common law position, but many of the problems still remain. We will now consider the rules governing the admissibility of intrinsic and extrinsic materials currently in force in New Zealand. Because these rules have been adequately covered elsewhere<sup>1</sup> only a brief account of them will be given here. The main concern of this chapter will be the underlying policy issues and reform proposals.

## II. THE PRESENT POSITION

(1) Internal Context

It hardly needs repeating that statutes are a communication between Parliament and the various audiences

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1. For full discussion see R. Cross 'Statutory Interpretation' and E.A. Driedger 'The Construction of Statutes'.

to which the statutes are addressed. The general rules and principles of communication apply to their interpretation. Various so-called legal maxims, for example *noscitur a sociis*, *ejusdem generis* and *expressio unius est exclusio alterius*, are in fact general principles of language<sup>2</sup> and may affect the meaning of doubtful words or phrases. The first two in particular are merely an aspect of the general rule that words derive clear meaning from their context - the meaning of a word is influenced by the other words with which it is associated (*noscitur a sociis*), and, more specifically, general words may be restricted to the same genus as the specific words that precede them (*ejusdem generis*). This general rule about context is perhaps the most important linguistic rule or principle affecting the interpretation of statutes. The courts have stressed on numerous occasions that an Act must be read as a whole.<sup>3</sup> Although regard for the immediate statutory context alone would probably not satisfy the semanticist, it will often help the court to resolve the uncertainty with which it is faced. It will however be of more use in some cases than in others, as Lord Reid notes in IRC v Hinchy<sup>4</sup>:

"It is no doubt true that every Act should be read as a whole, but that is, I think, because one assumes that in drafting one clause of a bill the draftsman had in mind the language and substance of the other clauses, and attributes to Parliament a comprehension of the whole Act.

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2. See p. 163.

3. See for example, Fair, J. in United Insurance Co Ltd. v R [1938] NZLR 885 at 913.

4. [1960] AC 748, 766.

But where, as here, quite incongruous provisions are lumped together and it is impossible to suppose that anyone, draftsman or Parliament, ever considered one of these sections in the light of another, I think it would be just as misleading to base conclusions on the different language of different sections as it is to base conclusions on the different language of sections in different Acts."

The meaning of words may of course be affected by the inclusion of a statutory definition section. These usually take one of two forms; either a particular word 'shall mean' something or it 'shall include' something. Where the former is used, the meaning indicated will prevail over any ordinary meaning that may otherwise have been indicated by the context. If the latter formulation is used, the meaning indicated will apply together with any ordinary meaning indicated by the context.

Clearly, to read an Act "as a whole" involves a consideration of the enacting provisions. The question is, does it also involve a consideration of the non-enacting parts of a statute, the title, preamble, headings, etc.? As these may provide some evidence of intention, arguably they should be considered in resolving the uncertainty. As we have already noted, however, relevance does not always determine admissibility. A body of common law has developed which excludes many such non-enacting parts of the statute from consideration. In New Zealand, the Acts Interpretation Act governs the admissibility of some, but not all these items.

Section 5(e) declares the preamble to be available "to assist in explaining the purport and object of the Act."

This enacts the common law position.<sup>5</sup> No mention is made of the title but at common law this may be used as a guide to interpretation.<sup>6</sup> This common law practice continues to apply in New Zealand.<sup>7</sup> However while at common law the preamble and title could both be looked at to resolve an uncertainty, they could not be used to affect the otherwise clear words of an Act. It has been pointed out by J.F. Burrows that section 5(j) of the Acts Interpretation Act seems implicitly to reverse this rule in New Zealand.<sup>8</sup>

Section 5(f) states that the headings of any parts of an Act "shall be deemed . . . to be part of the Act, but the said headings shall not affect the interpretation of the Act." This can be compared with the common law position where headings can be used to resolve an ambiguity in the body of the Act. Recently it has become doubtful whether headings should not play an even greater role at common law. In DPP v Schildkamp<sup>9</sup> Lord Upjohn, supported by Lord Reid, considered headings to be part of the general context which is relevant in determining even the scope of words which appear unambiguous when read by themselves.

Section 5(g) states that marginal notes shall not

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5. See A.G. v Prince Ernest Augustus of Hanover [1957] AC 436. See also DPP v Schildkamp [1971] AC 1. The preamble can be looked at as part of the general context even when there is no apparent ambiguity.
  6. For judicial statement of rule concerning titles see Donovan, J. in R v Bates [1952] 2 All ER 842 at p.844.
  7. See for example United Motors Ltd v Motor Spirits Licensing Authority [1964] NZLR 146 at 151.
  8. See J.F. Burrows, 'The Cardinal Rule of Statutory Interpretation in New Zealand' [1969] 3 NZLR 253 at p.257.
  9. loc. cit.



be deemed to be part of an Act. This corresponds with the common law position.<sup>10</sup> Since they are not to be considered part of the Act, they cannot influence the sense or scope of statutory words. Their utility lies solely in their function as a visual guide to the contents of an Act.<sup>11</sup>

Section 5(h) deems every Schedule and Appendix to be part of the Act in which it is contained. This again enacts the common law position.

Nothing is mentioned of punctuation in the Act. Presumably the common law position continues to apply. This has been called "one of the more bizarre rules of statutory interpretation."<sup>12</sup> Namely, punctuation is to be disregarded in the construction of statutes. Whether in fact this is possible in practice is debatable. "Correct punctuation can lead the mind of the reader to the grammatical construction intended by the draftsman, just as incorrect, too much or too little, can lead him astray. Punctuation may therefore have a subconscious as well as conscious influence on the mind of the reader."<sup>13</sup>

## (2) External Context

A literal construction is concerned primarily with the words of a statute; the intention of Parliament is to be discovered from those words. A judge adopting such an approach therefore would most likely end his considerations of context once he had read the act as a whole.

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10. See A.G. v Great Eastern Railway Co. (1879) 11 Ch.D.449.

11. E.A. Driedger op.cit. p. 109.

12. M. Zander 'The Law-Making Process' p.59.

13. E.A. Driedger op.cit. p.109.

A few, unfortunately, would not even go so far as this. A court adopting a mischief or purposive approach on the other hand may decide to look outside the statute to determine Parliament's intention if it is unable to determine that intention from the act itself. The extent to which it can consider evidence of intention from outside the act is strictly limited however. A body of common law rules has grown up which determines the admissibility of such evidence. These rules may make the difference between helping and hindering a court to discover the true intention of Parliament.

The following discussion of the admissibility of extrinsic evidence will be divided under three heads; general background, legal background and legislative history.

(a) General Background. As Lord Denning says:

"A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used; and what was the object appearing from those circumstances, which Parliament had in view . . . but how are the courts to know what were the circumstances with reference to which the words were used? And what was the object Parliament had in view? . . . All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well informed people." 14

The historical setting of a statute might be of assistance in its interpretation. The historical

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14. per Lord Denning in Escoigne Properties v IRC [1958] 1 All ER 406 at 414.

or 'social',<sup>15</sup> context will often reveal the 'mischief' which Parliament intended to remedy or the circumstances it had in mind when enacting the legislation. Previous cases, legal textbooks and perhaps even general historical works may be referred to as evidence of this background.<sup>16</sup>

The case of Chandler v DPP<sup>17</sup> illustrates reference to the general historical background of legislation as evidence of the intention of Parliament. In that case the House of Lords held that protestors obstructing an airfield acted for a purpose "prejudicial to the safety or interests of the state" (S.I. Official Secrets Act 1911 (U.K.)) even though they agreed with the sentiments of the protestors' ultimate cause. As Lord Reid said:

"The 1911 Act was passed at a time of grave misgiving about the German menace, and it would be surprising and hardly credible that Parliament of that date intended that a person who deliberately interfered with vital depositions of the armed forces should be entitled to submit to a jury that government was wrong and that what he did was really in the best interests of the country, and then perhaps to escape conviction because a unanimous verdict on the question could not be obtained." 18

Occasionally a broader reference is made to the 'intellectual' context of legislation.<sup>19</sup> Presumably this refers to the interpreter's own general knowledge acquired through education and experience. It thus encompasses more than just knowledge of the prevailing

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15. See E.A. Driedger op.cit. p. 124.

16. For example of reference to a general history text see Ledwith v Roberts [1936] 3 All ER 570 where in the interpretation of the U.K. Vagrancy Act 1826 reference was made to 'Webb's English Poor Law History' Part 1 to ascertain the broad features of the class 'vagrants'. However such reference is exceptional.

17. [1964] AC 763.

18. Ibid. at p. 791.

19. See E.A. Driedger op. cit. p. 125.

social conditions. Whereas knowledge of the latter will usually be of relevance to the reason for a statute, this wider background knowledge may be relevant to the actual meaning of statutory words.<sup>20</sup>

Dictionaries and other literary sources<sup>21</sup> also form part of the general background and may be referred to as an aid to the construction of statutory words. In many cases dictionaries are used as evidence of ordinary meaning.<sup>22</sup> Such evidence is of course subject to any contrary indications from the statute itself. Where the statute fails to provide evidence of the intention of Parliament, dictionaries may be of help. As Lord Coleridge recognised in R v Peters<sup>23</sup>:

"I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books."

Sometimes, however, a judge will give more weight to judicial statements of meaning than to statements found in dictionaries.<sup>24</sup> Since, on the whole, the latter accord more closely with the commonly accepted meaning of words, this practice is open to criticism. Interpretation, it would seem, has increasingly become a

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20. For examples of the application of this 'intellectual' context see E.A. Driedger Ibid. p. 125.

21. The courts frequently refer to the works of writers such as Coke, John Stuart Mill and Sir James Stephen.

22. See for example Cozens Hardy MR in Camden (Marquis) v IRC [1914] 1 KB. 641 at p. 647.

23. (1886) 16 Q.B.D. 636 at p. 641.

24. See for example the dissenting opinion of Lord MacNaughton in Midland Rail Co. and Kettering, Thrapston and Huntingdon Rail Co v Robinson (1890) 15 App. Cas. 19 at pp. 34-5.

specialised process, removed from the realm of the ordinary citizen whom it professes to represent.<sup>25</sup> In this respect at least the House of Lords' attempt in Cozens v Brutus<sup>26</sup> to reverse this trend is to be commended.

(b) Legal Background.

The courts may of course have regard to the existing state of the common law as a guide to Parliament's intention. This has already been discussed fully above and need not be repeated. Of increasing importance is their regard for statute law. Firstly, they may have regard for earlier statutes in pari materia. The general principle is stated by Lord Mansfield in R v Loxdale<sup>27</sup>:

"Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory to each other."

Thus it seems that an earlier statute in pari materia with a later one is part of the context to be considered in deciding whether the meaning of a provision in the later statute is plain.<sup>28</sup> The earlier statute may not be allowed to raise an ambiguity although it may help to resolve an ambiguity raised by other considerations.<sup>29</sup>

A related but not identical point is the court's

25. For similar comments on the use of the phrase 'well-informed people' by Lord Denning in Escoigne Properties Ltd. v IRC loc.cit.p.565, see R. Cross, op.cit.p.122.

26. [1973] AC 854

27. (1758) 1 Burr. 445 at p. 447.

28. See R. Cross op.cit. p.128 who cites Lord Simonds in A.G. v Prince Ernest Augustus of Hanover loc.cit. at p. 461 in support of this proposition.

29. R. Cross, Ibid. p. 128.

regard for the history or evolution of a particular provision. Sometimes assistance may be gained by tracing the legislative antecedents of the doubtful provision. Changes or similarities in the text due to repeal or reenactment may indicate the intended meaning.

Secondly, a court may have regard to earlier statutes not in *pari materia*, but in the same general category. These earlier statutes may influence the meaning of a later one by contrast or analogy, the idea being to promote harmony within the body of the law as a whole.<sup>30</sup> There is no obligation on the judge to consider these statutes as there is with statutes in *pari materia*.<sup>31</sup>

A court will look at earlier judicial decisions on the provision under consideration. In the sense that the use of precedent involves the adoption of a meaning already ascertained, it is one step removed from the ascertainment of meaning itself. For this reason the following discussion of the binding nature of precedent in cases involving the construction of statutes is by way of summary only.<sup>32</sup>

In Paisner v Goodrich<sup>33</sup> and London Transport Executive v Betts<sup>34</sup> Lord Denning, in dissent, adopted the view that decisions on interpretation should only be regarded as authority for what they actually decide in subsequent cases involving similar facts. He thought

30. E.A. Driedger op.cit. p.133.

31. R. Cross op.cit. p. 129.

32. For full discussion see R. Cross 'Precedent in English Law'. For discussion of the effects of Cozens v Brutus see J.F. Burrows 'Some Reflections on Cozens v Brutus' [1975] 4 Anglo-American L.Rev. 366.

33. [1955] 2 QB 343.

34. [1959] AC 211.

that the words which the judge has used in giving his decision were not binding.<sup>35</sup> In his opinion, it was up to each new court to decide whether the situation before it differed in a material respect from that in the previous case and in so deciding the court was not bound by the principle which the judge in the previous case appeared to have considered necessary for his decision.<sup>36</sup>

On appeal to the House of Lords, the majority decision of the Court of Appeal in Paisner v Goodrich was reversed. Although alluding to Lord Denning's comments, the Lords do not appear to have agreed with them. Lord Reid had this to say:

"No court is entitled to substitute its words for the words of the act. A court, however, can, and must, decide the appropriate test in a particular case and, when the Court of Appeal has laid down a test, that test ought to be followed in all cases which do not present substantial relevant differences . . . . That does not mean that the words used by the Court of Appeal are to be treated as if they were words in an act of Parliament. In substantially different circumstances they are only a guide, and not a rule." 37

Unlike Lord Denning, Lord Reid obviously considers that the judge in a subsequent case should have regard to the words used by the previous judge in order to determine whether there are relevant differences between the facts of the two cases.<sup>38</sup>

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35. Paisner v Goodrich loc. cit. p. 358.

36. See R. Cross, 'Precedent in English Law' p. 172.

37. Goodrich v Paisner [1957] AC 65 at p. 88.

38. See R. Cross op.cit. p.173. This view is borne out by the fact that in London Transport Executive v Betts loc. cit. Lord Reid asserted in effect that there is no difference, so far as the binding force of the ratio decidendi is concerned, between a decision on the construction of a statute and a decision on any other point of law.

In civilian systems of law there is no doctrine of binding precedent in relation to interpretation of statutes. Lord Denning seems to be propounding a view which, while not going so far, does give a court great flexibility in deciding whether or not to follow a previous decision. The view put forward by Lord Reid, on the other hand, seems to equate this aspect of interpretation more closely with analogy. Both have some merit. Arguably the view put forward by Lord Denning is supported by the fact that the actual words used by Parliament ought to be given more weight than judicial statements concerning those words. That put forward by Lord Reid accords with the need for consistency in the law. Furthermore, it should not be forgotten that in deciding a case a court is in fact redefining the scope of the legal rule.<sup>39</sup>

As E.H. Levi points out,

"... a court's interpretation of legislation is not dictum. The words it uses do more than decide the case. They give broad direction to the statute." <sup>40</sup>

In theory, the recent House of Lords decision in Cozens v Brutus<sup>41</sup> seems to point more in the direction of Lord Denning's view at least so far as 'ordinary words of the English language' are concerned. In practice, however, it is most unlikely that the courts will disregard previous decisions on the same act. Force of habit, convenience and the requirement of consistency in judicial decisions make it likely that a previous decision

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39. See p. 92.

40. E.H. Levi 'An Introduction to Legal Reasoning'. p.32.

41. [1973] AC 854.



will still operate as a precedent.<sup>42</sup> While not laying down binding rules, such decisions may at least provide useful 'guides'.<sup>43</sup> In this respect the situation is similar to that in civilian systems where, although not binding, previous decisions on the same provision are certainly of persuasive value and are considered in practice.<sup>44</sup>

(c) The Legislative History.

We shall divide our discussion of the admissibility of legislative history into three parts:

- (i) the admissibility of pre-parliamentary materials.
- (ii) the admissibility of parliamentary materials, and
- (iii) the extent to which international agreements may be considered in the interpretation of domestic Acts.<sup>44a</sup>

(i) Pre-parliamentary materials can be divided into two categories.<sup>45</sup> First, there are reports of a committee which precedes and leads to a particular statutory enactment. These would include the reports of Royal Commissions, law reform and departmental committees. Secondly, there is any other form of material. This would include documents such as the explanatory memoranda attached to bills and White Papers. The rule with regard

42. See J.F. Burrows 'Some Reflections on *Cozens v Brutus*' op.cit. at p.382. For an example see *Kimpton v Steel Co. of Wales* [1960] 1 W.L.R. 527. The Court of Appeal accepted that the question of whether three steel steps constituted a 'staircase' was a question of fact, the word 'staircase' being one in daily use. Nevertheless reference was made to a previous case where "there was a somewhat similar set of steps."

43. J.F. Burrows, *ibid.* p.382.

44. See J.H. Merryman 'The Civil Law Tradition' p.48.

44a. I am grateful to Dr. D. Miers for information supplied on the topic of legislative history.

45. See M. Zander op.cit. p.67.

to the latter is clear; the courts may not look at any such material either for ascertaining the purpose or for ascertaining the meaning of legislation. We are concerned here with the law relating to the first category of materials.

Until 1898 the courts refused to take account of any pre-parliamentary publications. Then in Eastman Photographic Materials Co. Ltd. v Comptroller General of Patents<sup>46</sup> Lord Halsbury held it permissible to look at the report of a Royal Commission to clarify the 'mischief' at which the statute was aimed.<sup>47</sup> It was still not permissible to consider such reports as an aid to the construction of the statutory words themselves however.<sup>48</sup>

The present position was established in the Black Clawson case.<sup>49</sup> There the court considered a section of the Foreign Judgements (Reciprocal Enforcement) Act 1933 which was a verbatim reproduction of a draft clause prepared by the Committee on whose report the Act was based. The Lords were unanimous in their opinion that it was permissible to look at the Report to understand the background to the legislation.<sup>50</sup> They were divided on the issue of whether it is permissible to look at the Report to determine the meaning of disputed words. Lords Dilhorne and Simon took the following view:

"where Parliament is legislating in the light of a public report I can see no reason why a court of construction should deny itself any part of that light and insist on groping for

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46. [1878] AC 571.

47. See Lord Halsbury Ibid. at p.575.

48. Assam Railway Co. Ltd v IRC [1935] AC 445.

49. [1975] 1 All E.R. 810.

50. See for example Lord Wilberforce Ibid. p.629.

a meaning in the darkness or half light. I conclude therefore that such a report should be available to the court of construction, so that the latter can put itself in the shoes of the draftsman and place itself on the parliamentary benches . . . The object is . . . to ascertain the meaning of the words used, that meaning only being ascertainable if the court is in possession of the knowledge possessed by the promulgator . . . " 51

Lords Reid, Wilberforce and Diplock disagreed with this view and reiterated the established position.

Three years after the Black Clawson case the House of Lords again considered the issue in the case of Davis v Johnson.<sup>52</sup> Lord Diplock reiterated the unanimous view expressed in Black Clawson as to the admissibility of reports to ascertain the purpose of a statute. He approved the majority view that they are inadmissible as evidence of meaning. Lord Kilbrandon agreed. Lord Salmon regarded the first part of Lord Diplock's reiteration as 'well-settled practice'. Viscount Dilhorne made no reference to the views expressed by him in Black Clawson and Lord Scarman neither approved nor disapproved of what Lord Diplock said. He did however think it desirable that Parliament indicate clearly in individual statutes whether pre-parliamentary reports were to be a proper guide to their interpretation.

The situation was left somewhat uncertain by these House of Lords cases. The present position remains that pre-parliamentary materials may be referred to as an indication of purpose but not meaning as such. Some judges have obvious doubts as to whether this practice

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51. per Lord Simon Ibid. p.546.

52. [1979] AC 317.

should continue. Lord Scarman sought to clarify the issue in his recent Interpretation Bill. The Bill failed in its initial form largely because of its attempt to liberalise the law relating to the admissibility of such material.<sup>53</sup> The indications are that current feeling remains against any change.

(ii) Parliamentary materials include Parliamentary debates, explanatory and financial memoranda attached to Bills and Notes of Clauses prepared for a Minister by his department. Such materials are not admissible as evidence of Parliamentary intention.<sup>54</sup> This rule was recently brought into issue by Lord Denning's Court of Appeal decision in Davis v Johnson<sup>55</sup> where he admitted gaining assistance in his construction from things said in Parliament:

"Some may say, and indeed have said, that judges should not pay any attention to what is said in Parliament. They should grope about in the dark for the meaning of an Act without switching on the light. I do not accede to this view. In some cases Parliament is assured in the most explicit terms what the effect of a statute will be. It is on that footing that members assent to the clause being agreed to. It is on that understanding that an amendment is not pressed. In such cases I think the court should be able to look at the proceedings. . . and it is obvious that there is nothing to prevent a judge looking at these debates himself privately and getting some guidance from them. Although it may shock the purists, I may as well confess that I have sometimes done it. I have done it in this very case. It has thrown a flood of light on the position . . ."<sup>56</sup>

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53. For a full discussion of the Bill's proposals see pp. 207-211 and pp. 218-221 below.

54. See for example Lord Simon of Glaisdale in Ealing London Borough Council v Race Relations Board [1972] 2WLR 71 at p.82.

55. [1979] AC 264.

56. Ibid. pp. 276-7.

The House of Lords in the same case unanimously declared the above approach to be wrong. Lord Scarman had this to say on the matter:

"There are two good reasons why the courts should refuse to have regard to what is said in Parliament or by Ministers as aids to the interpretation of a statute. First, such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressures of executive responsibility, essential features of open and responsible government, are not always conducive to a clear and unbiased explanation of the meaning of statutory language. And the volume of Parliamentary and ministerial utterances can confuse by its very size. Secondly, counsel are not permitted to refer to Hansard in argument. So long as this rule is maintained by Parliament (it is not the creation of the judges), it must be wrong for the judge to make any judicial use of proceedings in Parliament for the purpose of interpreting statutes." 57

As Lord Denning has admitted however, there is nothing to stop a judge having regard privately to Parliamentary materials. The exclusionary rule merely stops him from using any information he gains as a basis for his decision.<sup>58</sup> Evidence that a private investigation of this kind occurs appears from time to time in cases where unreferenced passages appear to be taken virtually verbatim from debates.<sup>59</sup> Similarly, Parliamentary debates may be indirectly brought to the attention of the court through the analysis of legislative history in textbooks.<sup>60</sup> Recently, Lord Hailsham has commented on this practice

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57. Davis v Johnson [1979] AC 317 at pp.349-50.

58. See R. Cross op.cit. p.130.

59. For example see the Privy Council case of In re The Regulation and Control of Aeronautics in Canada [1932] AC 54.

60. See Bradford City Council v Lord Commissioners (1978) unreported - referred to by Lord Denning in 'The Discipline of Law' p.10.

of referring privately to Hansard:

"It is really very difficult to understand what (Parliamentary draftsmen) mean sometimes. I always look at Hansard, I always look at the Blue Books, I always look at everything I can in order to see what is meant and as I was a Member of the House of Commons for a long time of course I never let on for an instant that I had read the stuff. I produced it as an argument of my own, as if I had thought of it myself. I only took the trouble because I could not do the work in any other way." 61

(iii) Finally we will consider the extent to which international treaties and conventions may influence the interpretation of a domestic Act. This is an issue of increasing importance as more and more British and Commonwealth acts give effect to such agreements. In the case of R v Chief Immigration Officer, Heathrow Airport, ex parte Bibi,<sup>62</sup> the U.K. Court of Appeal held that where an international agreement to which Britain is a signatory has not been incorporated into domestic law it cannot override the meaning of a U.K. Statute, even though the two may conflict. The position is quite different where the convention is incorporated into domestic law by statute. Two House of Lords cases have recently laid down guidelines as to the interpretation of such legislation. The most recent and important is Fothergill v Monarch Airlines.<sup>63</sup> The Lords considered three issues:

1) What approach is a British court to adopt in interpreting such legislation?

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61. House of Lords debate on the U.K. Interpretation Bill, 26th March 1981.

62. [1976] 3 All ER 843.

63. [1980] 2 All ER 696.

- 2) To what aids may the court have recourse?
- 3) If the courts may have recourse to travaux préparatoires, by what criteria are they to select the material and what weight are they to give to it?<sup>64</sup>

In answering the first question assistance was obtained from the earlier House of Lords case, James Buchanan v Babco.<sup>65</sup> Here the Lords had unanimously supported the following proposition stated by Lord Wilberforce:

"The correct approach is to interpret an English text . . . in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by legal precedent but on broad principles of general acceptance." <sup>66</sup>

The majority of the House of Lords in Fothergill agreed with Lord Wilberforce; the most important reason for adopting a broad approach being to ensure as far as possible a uniformity of interpretation among the signatory states.

As to the second question, Lord Scarman considered that English judges "should be able to have recourse to the same aids of interpretation as their brother judges in other contracting states."<sup>67</sup> This included travaux préparatoires, the preparatory works frequently prepared and published prior to the signing of international agreements. Lord Diplock went so far as to consider that English courts were possibly under a duty to consider such material.<sup>68</sup> The rest of the court was not prepared to go

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<sup>64</sup>. These questions were posed by Lord Scarman, *ibid.* at p. 713.

<sup>65</sup>. [1977] 3 All ER 1043.

<sup>66</sup>. *Ibid.* at p. 1052.

<sup>67</sup>. Fothergill v Monarch Airlines loc. cit. p. 715.

<sup>68</sup>. *Ibid.* p. 707.

quite that far, however. Lord Wilberforce thought this preparatory material would be useful when it was public and accessible and when it clearly pointed to a definite legislative intention.<sup>69</sup>

The weight to be attached to this material was held to be a matter for the court to decide, but,

"if there be ambiguity or doubt, or if a literal construction appears to conflict with the purpose of a convention, the court must then . . . have recourse to such aids as are admissible and appear to it to be not only relevant but helpful on the point under consideration. Here marginal relevance will not suffice; the aid must have weight as well." <sup>70</sup>

### III. POLICY

The general aims of any policy relating to legal procedure should be to promote rationality,<sup>71</sup> efficiency and fairness. Prima facie these ends would best be served by the admissibility of all relevant evidence and material. It is submitted that the onus is on those who seek to exclude materials to produce convincing reasons based on rationality, efficiency and fairness or other relevant values.<sup>72</sup> It is now proposed to consider particular policy arguments put forward for the admissibility or inadmissibility of extrinsic materials. Having stated these arguments, we will consider their adequacy as judged

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69. Ibid. p.703.

70. per Lord Scarman Ibid. p. 716.

71. Compare definition of 'rationality' in Max Weber on 'Law in Economy and Society' translated by Max Rheinstein. Weber distinguishes between formal and substantive rationality. The latter would subsume values such as fairness under an overall concept of rationality.

72. Compare R.S. Summers 'Evaluating and Improving Legal Processes - A Plea for Process Values' (1974) 60 Cornell L.R. 1.



by the basic values listed above.

Arguments against the admissibility of extrinsic evidence as an aid to interpretation fall under two heads; theoretical and practical. We shall start by considering the theoretical justifications for the present position.

(1) Conformity to the 'Ordinary Meaning' of Language

The 'Diplock principle' of normal usage<sup>73</sup> has already been noted and commented on. The court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates. In other words, it must give the words their 'ordinary' meaning. What is important is what the statute says, not what the legislators meant it to say. This basic principle of the English legal system has been used to justify the exclusion of materials outside the statute and unavailable to the ordinary man or woman. The reason for the inclusion of certain internal materials such as the preamble becomes obvious in light of this principle; such materials would be taken into account by the normal user when construing a statute. On the other hand, it would be quite ridiculous to expect those acting on the statute extrajudicially to refer to extrinsic materials when they consider the statutory meaning to be plain without them.<sup>74</sup>

Not all would agree that adherence to the above principle produces the most desirable result however.

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73. See Lord Diplock in Black Clawson case 1975 1 All ER 810 at p.836; cited above at p. 121.

74. R. Cross op,cit. pp. 133-134.

It has been claimed<sup>75</sup> that its application means that the judge in our legal system

"does not generally feel himself under the same obligation to search as deeply as possible for the most satisfactory meaning of the statute, if he has to hand an interpretation which accords with the normal usage of language as employed in the text of the statute, and of the more obvious and immediate contextual implications of the text."

This is unfortunate reasoning. The main justification for the ordinary meaning approach is that it affords the best evidence of the legislative intent in the normal case. It does not afford justification for judicial laziness nor the acceptance of anything less than the most satisfactory meaning. It is debatable however whether the extrinsic evidence exclusionary rules should in fact be based on the supposed practices of the 'normal user' of language. As often as not, it will be the ordinary person's legal advisor who considers the import of various statutes. Such an advisor is hardly a 'normal user' of language. Lawyers will usually have resort to specialist textbooks whose authors have had access to extrinsic materials and will consider them in giving their advice.

## (2) Derogation From the Court's Powers

The courts alone have the task of definitive statutory interpretation. It is sometimes argued that

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75. See Norman S. Marsh QC in 'Interpretation in a National and International Context' p.75. (lectures delivered at the Centre for European Studies in Luxembourg in 1973, and published by U.G.A. in Belgium in 1974, quoted in R. Cross op.cit. p.133).

reference to non-statutory materials, such as committee reports and Parliamentary debates, would detract from the court's function as interpreter by conferring that role on Parliament itself. At the very least, it is argued, the courts would become a 'reflecting mirror' of that body. As Lord Wilberforce has stated in the Black Clawson Case:<sup>76</sup>

"Legislation in England is passed by Parliament, and put in the form of written words. This legislation is given legal effect upon subjects by virtue of judicial decisions, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power which has devolved on the judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the rule of law - as distinct from the rule of the King or of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say."

Related to this argument is Lord Halsbury's point that those responsible for an Act are the worst persons to interpret it.<sup>77</sup>

It is surely going too far, however, to suggest that in such circumstances Parliament has become interpreter as well as lawmaker. Extrinsic materials would merely provide evidence that one interpretation is to be preferred to another. The weight, if any, to be given to this evidence would remain entirely at the discretion of the court. The court alone would retain the task of applying general Parliamentary intentions to the case before it.

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76. loc. cit. p. 828.

77. Cf. Y.B. 33 & 35 Edw.1.(RS) 83.

(3) Derogation From The Sovereignty of Parliament

Alternatively, it has been argued that reference to pre-Parliamentary materials confers on the committee, Commission or other such body the role of lawmaker and so derogates from the sovereignty of Parliament. Only the statute in its final form, passed by Parliament, represents the law. Reference to the recommendations of pre-Parliamentary committees could well result in the court giving weight to things which never in fact received full Parliamentary assent. As Lord Wright said in Assam Railway Co. Ltd v IRC:<sup>78</sup>

"On principle no such evidence for the purpose of showing the intention, that is the purpose or object, of an Act is admissible; the intention of the legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate . . . it is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted."

However, where a statute clearly manifests an intention to implement such a Report, as for instance where it is virtually identical in its terms to the draft bill proposed by the Report, the above argument loses its effect. The counter arguments for admitting evidence of the Report recommendations are set out below.

(4) The Parol Evidence Rule

The rule excluding certain extrinsic materials arguably forms part of a wider rule which excludes parol evidence in the construction of deeds and other written

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78. loc.cit. at p. 458.

documents. Although the rule is expressed in terms of parol evidence, it does in fact apply to all forms of extrinsic evidence.<sup>79</sup> Basically the rule means that the interpretation of a document must be found in the document itself with the addition, if necessary, of such evidence as is admissible for explaining or translating the words or expressions used in that document.<sup>80</sup> The justification for the rule is that when parties have recorded their agreement in an instrument it is in everyone's interest, in order to obtain certainty, to presume that the instrument records the full and final intentions of the parties. This reasoning is at the root of objections to the admissibility of extrinsic evidence in the interpretation of statutes.

The major practical arguments against the admissibility of parliamentary materials were identified by Lord Reid in Beswick v Beswick.<sup>81</sup>

"In construing any Act of Parliament we are seeking the intention of Parliament, and it is quite true that we must deduce that intention from the words of the Act. If the words of the Act are only capable of one meaning we must give them that meaning, no matter how they got there. But if they are capable of having more than one meaning we are, in my view, well entitled to see how they got there. For purely practical

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79. 'Odger's Construction of Deeds and Statutes' 5th edition by G.Dworkin, p. 106.

80. Ibid. p.106.

81. [1968] AC 58.

reasons we do not permit debates in either House to be cited. It would add greatly to the time and expense involved in preparing cases involving the construction of a statute if Counsel were expected to read all the debates in Hansard, and it would often be impracticable for counsel to get access to at least the older reports of debates in select committees of the House of Commons; moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the court . . . " 82

The same arguments, although to a lesser extent, apply to a consideration of pre-parliamentary material. Lord Mishcon has recently been at pains to point out the same difficulties:

" . . . the interpretation of an Act of Parliament is not just the job of the Courts; it is the almost daily job of my profession in advising ordinary citizens, and that power to interpret must not be beset by measures which make that interpretation uncertain or cumbersome or expensive." 83

#### (5) Availability

Statutes are addressed not merely to courts but to a wider audience. The question is, would the materials discussed above be sufficiently available to the whole legislative audience to be part of the legislative context and thus capable of affecting actual meaning in the manner of context generally?<sup>84</sup>

Reports of Parliamentary debates were not available until the nineteenth century. Indeed it was regarded as contempt to publish such debates. F.W. Maitland in 'The Constitutional History of England'<sup>85</sup> writes:

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82. Ibid. pp. 73-4.

83. House of Lords debate 13th February 1980 Col. 290.

84. R. Dickerson op.cit. p. 147.

85. 'The Constitutional History of England' ed. by H.A.L. Fisher at p. 376.

"This perhaps we ought to regard in its origin as a measure of self-protection against the Crown; so long as the Houses had to dread the action of the Crown, they did well to insist that their proceedings should be secret."

Such reports have been available since the nineteenth century at a cost. In Britain, for example, the cost of Hansard materials is way beyond the means of most law firms and many libraries. The 1981 daily subscription for both House of Commons and House of Lords debates was £267. For papers other than debates, for example command papers, bills, votes and proceedings, the Commons' papers were available at a cost of £4,660 per annum and the Lords' papers at £1,320 per annum. These figures represent the cost of a current subscription only and are quite apart from the cost of a full back run of materials. For this reason few public libraries have a complete set of materials and if a practitioner wishes to consult them he will have to go to the reference library of one of the larger cities, a university library, or law society library. Small town and country practitioners would immediately be at a disadvantage should they be obliged to consult these debates.

Even assuming that this information is practically available to both courts and practitioners, is this enough to make it part of the legislative context? It would seem not.<sup>86</sup> Firstly, the average citizen is not presumed to rely on lawyers for information about statutes governing his or her actions. Every citizen is however presumed to have knowledge of the law. In return,

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86. See R. Dickerson, op.cit. at p.150.

Parliament is to make the law reasonably accessible to the general legislative audience. As R. Dickerson puts it,

"the notion that reasonable access to legislative communication is being provided implies that both the statute and the collateral matters of context of which it takes account are shared or are reasonably shareable . . . on this basis, items of legislative history, no matter how relevant and reliable, are no part of the proper legislative context, if they are significantly less accessible than the standard of accessibility implicit in the constitution requires." 87

No one could argue that the present availability of legislative history meets this requirement.

Secondly, the information that is practically available to a lawyer when he considers the application of a statute to a past event is not necessarily the kind of information that is practically available to him when he wishes to advise a client on future conduct in relation to a statute.<sup>88</sup> It may be difficult to search legislative history as it relates to a particular dispute, but it is almost impossible to search it in the hope of anticipating all problems that might arise sometime in the future.

#### (6) Relevance

Even if legislative history were readily available, it is doubtful whether much of it would be relevant to specific disputes. Reed Dickerson points out that amongst the almost unlimited number of potential controversies that may arise, probably only a very few would get any assistance from anything in the legislative history.<sup>89</sup>

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87. Ibid. pp. 151-2.

88. Ibid. p. 150.

89. Ibid. p. 154.



Even in these few cases, much relevant material may in fact be unreliable. Lord Reid also recognised that extrinsic materials may or may not help to resolve the issue in Beswick v Beswick,<sup>90</sup> and again in Black Clawson:

"The questions which give rise to debate are hardly ever those which later have to be decided by the courts. One might take the views of the promoters of the Bill as an indication, but any view the promoters may have had about questions which later come before the court will not often appear in Hansard and often those questions have never occurred to the promoters."<sup>91</sup>

All other factors being equal, the irrelevance of extrinsic material in some cases should not be used as an argument for its general inadmissibility. But very rarely will all other factors be equal. The question of relevance cannot be considered in isolation from other policy factors. The ultimate question must be whether the time, energy and money spent on making these materials available and examining them is justified by their relevance in what may only be a very small number of cases. At the end of the day any judgement must be based on a cost-benefit analysis.

#### (7) Reliability

Unreliability is perhaps the greatest weakness of legislative history.<sup>92</sup> The reliability of particular material will depend very much on its source and the circumstances in which it arose. Parliamentary debates, for example, would seldom have much credibility for the purpose of interpretation. The debates are largely

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90. loc.cit. p.74.

91. Black Clawson loc.cit. p. 815.

92. See R. Dickerson op.cit. p. 155.

dominated by those promoting the enactment of the particular piece of legislation. It has been said that this process is not "an intellectual exercise in the pursuit of truth but an essay in persuasion or perhaps almost seduction."<sup>93</sup> What is more, statements may be made by people with little real knowledge of the subject under discussion. Even when made by people with this knowledge, they are often tentative and may be impromptu.<sup>94</sup> Nor is there any guarantee that what is said represents the intention of all the legislators. As Reed Dickerson says:

"Legislators who ordinarily have little professional skill in achieving the kind of legislative definiteness needed in statutes, speaking in circumstances that call for gross oversimplification, at best describe only their subjective beliefs about what the bill is supposed to say." <sup>95</sup>

Committee Reports are somewhat less of a problem. The biggest risk with these is that their recommendations may not in fact have been adopted by Parliament.

Despite these criticisms, many countries do not consider legislative material so unreliable that it should be totally excluded from consideration. The courts discriminate between the value of various kinds of material.<sup>96</sup> In practice debates are much less likely to be used as evidence of intention than are, say, committee reports. Where debates are considered, the courts will probably only have regard to the Minister's

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93. J.A. Corry 'The Use of Legislative History in the Interpretation of Statutes' (1954) 32 Can.Bar.Rev. 624 at p. 631.

94. R. Dickerson op.cit. p.155.

95. Ibid. p. 156.

96. Law Com. No. 21 p.33.

speech. In no way are the courts compelled to give effect even to this evidence. The final decision as to meaning remains entirely at the discretion of the judge.

(8) Time and Expense

The practical inaccessibility of legislative materials is a consequence of the time and expense necessary to make them available and to give them proper consideration. Ultimately this expense would be borne by the ordinary citizen seeking legal advice. As a general rule, justice is best served by speedy, inexpensive procedure in the majority of cases. Arguably the additional information provided by legislative history in a few does not outweigh this benefit to the majority.

(9) Greater Uncertainty

It has been argued that the need to construe two or more documents instead of just one would increase rather than resolve uncertainty. The more words, the more doubts to be entertained.<sup>97</sup> This reasoning is questionable. The same argument would lead to the exclusion of all explanations and definitions,<sup>98</sup> which could hardly be considered desirable.

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97. See for example the introduction to Halsbury's 'Laws of England' where exactly this view was taken.

98. See J.H. Farrar 'Law Reform and the Law Commission' pp. 52-53.

#### IV. SOME PROPOSED REFORMS

General reform proposals for the law of statutory interpretation will be considered in the following chapter. The present discussion will deal only with those proposals relating to statutory context. Matters already provided for in the Acts Interpretation Act 1924 will not be dealt with. Rather, emphasis will be on those areas where the common law rules still prevail.

##### (1) Internal Context

Punctuation is one matter still governed by common law rules.<sup>99</sup> The English and Scottish Law Commissions in their Report on The Interpretation of Statutes 1969<sup>100</sup> recommended that punctuation should be taken into account in interpreting a statutory provision.<sup>101</sup> They noted the Scottish practice of giving effect to punctuation<sup>102</sup> and recognised its practical importance in conveying meaning and influencing the interpretation of an act.<sup>103</sup> The Renton Committee<sup>104</sup> agreed with this proposal and Lord Scarman's recent Interpretation Bill (U.K.) contained an identical clause to that proposed by the Law Commissions.<sup>105</sup>

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99. See p.175.

100. Law Com. No. 21.

101. Ibid. p. 25. A clause to this effect was included in their draft proposals; see clause 1(1)a.

102. See for example Alexander v MacKenzie [1947] JC 155.

103. Law Com. No. 21.p.25.

104. In its Report on the Preparation of Legislation, published 1975.

105. See clause 1(1)a Interpretation Bill (U.K.) contained in Appendix I to this thesis.

(2) External Context

The Law Commissions went on to consider whether the present law with regard to the admissibility of legislative history is satisfactory. First they considered the admissibility of pre-Parliamentary material. In principle they thought it right for the courts to consider this material which "must be assumed to be in the contemplation of the legislature."<sup>106</sup> They also thought that in principle a court should be able to consider this material not only to determine the mischief at which the provision was aimed, but also to determine the nature and scope of the remedy provided.<sup>107</sup> In clause 1(1)(b) of their draft proposals they made provision to this effect:

"In ascertaining the meaning of any provision . . . matters that may be considered shall include . . . any relevant report of a Royal Commission, Committee or other body which had been presented or made to or laid before Parliament or either House before the time when the Act was passed."

It would be for the court to decide whether any recommendations were in fact embodied in the resulting Act. Reference to White Papers might provide useful information on this point.<sup>108</sup> Clause 1(1)(a) of their draft proposals was designed specifically to include reference to White Papers. In its original form the 1980 Interpretation Bill (U.K.) contained a similar clause, but this was later dropped. Alternatively, the

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106. See Govindan Sellappah Nayar Kodakan Pillai v Punchi Banda Mundanayake [1953] AC 514 (Law Com. No. 21 p.30).

107. Law Com. 21. p.30.

108. Ibid. p.31.

Commissioners thought that a specially prepared explanatory document could provide guidance on this point.<sup>109</sup>

The Renton Committee disagreed with both the proposal relating to Committee Reports and that relating to material such as White Papers.<sup>110</sup> Parliament may in fact have intended to depart from the report; there might be difficulty in deciding if a particular report was in fact 'relevant'; and most important, to admit such material would place too great a burden on litigants, their advisors and the courts. Particular difficulties would arise for lawyers trying to advise their clients before a specific dispute had arisen.

In its original form Lord Scarman's Interpretation Bill 1980 contained a clause identical to that proposed by the Law Commissions in relation to Committee Reports. The Bill in this form failed to get its second reading in the House of Lords. The principal cause for its failure was this attempt to alter the existing law in relation to pre-Parliamentary materials. In 1981 Lord Scarman introduced a new and considerably modified Bill. No such clause was included.

The Law Commissions adopted a different stance with regard to Parliamentary materials. In general they thought that reports of Parliamentary proceedings should not be used by the courts for interpreting statutes.<sup>111</sup>

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109. Ibid. p. 31. The Commissions' recommendations on explanatory material will be discussed below.

110. See paras 19.15, 19.17 and 19.23 of their Report.

111. Law Com. 21 p.36.

In so deciding they were influenced by three considerations:

- a) The difficulty of isolating information which would be of assistance to the courts,
- b) The consequent difficulty of providing the information in a reasonably convenient and readily accessible form, and
- c) The possibility that in some cases the same function could be better performed by specifically prepared explanatory material available to Parliament when a Bill is introduced and modified if necessary to take account of amendments during its passage through Parliament.<sup>112</sup>

Such explanatory memoranda would be prepared by the promoters of the Bill. The bill itself would then specifically authorise its use as an aid to interpretation.<sup>113</sup> The memorandum would be especially valuable if it received some form of Parliamentary approval.<sup>114</sup>

The Commissioners recognised two basic criticisms to their proposal. First, opponents had argued that such memoranda would lead to Parliament conveying its intention in two documents instead of one. This, they argued, would create as many difficulties as it solved and might sometimes present the courts with an irreconcilable conflict of meaning. The Commissions answered this criticism by stressing that the explanatory materials would be no more binding on the courts than much other contextual material which is presently available.<sup>115</sup>

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112. Ibid. p.36.

113. Ibid. p.40.

114. Ibid. p.40.

115. Ibid. p.41.

The courts must still make the final decision as to meaning. It could well be that they regard a particular meaning as so compelling in the light of other contextual materials that it must be preferred to that suggested by the memorandum.<sup>116</sup> The second criticism related to the time and labour involved in preparing explanatory materials. On the whole the Commissions thought this objection to be rather overstated. However they did limit their immediate proposal to use in selected cases only. Clause 1(1)(e) therefore included among the list of contextual materials to be considered "any document which is declared by the Act to be a relevant document for the purposes(of ascertaining the meaning of any provision.)"

The Renton Committee also favoured retention of the present law relating to Parliamentary proceedings. They did not however favour the use of explanatory memoranda.<sup>117</sup> As originally presented to the House of Lords in 1980, the U.K. Interpretation Bill contained a paragraph to the same effect as the one proposed by the Commissions. This was dropped after debate and the 1981 Interpretation Bill contained no provision relating to the use of explanatory materials.

Finally the Commissions considered the use of treaties in the interpretation of domestic acts. They stressed that such treaties were part of the total context in which an act is to be considered and in clause 1(1)(d) recommended reference to "any relevant

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116. Ibid. p.42.

117. See para. 19.24.



treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by command of Her Majesty before that time, whether or not the United Kingdom were bound by it at that time." The Renton Committee approved of this proposal.<sup>118</sup> The Fothergill case<sup>119</sup> has in part overtaken this recommendation. But unlike the Fothergill case, the Law Commissions' proposal included reference to international agreements even though the country has not incorporated the agreement into domestic law. The 1981 U.K. Interpretation Bill included a clause to the same effect.

Recently, the Australian Parliament has also given attention to the question of reforming the law relating to the interpretation of statutes. Their reforms and proposals will be discussed in the following chapter. Notable among the proposals are plans to extend the use of explanatory memoranda as an aid to construction and to make a full inquiry into the use of committee reports with a view to laying specific recommendations before Parliament.

## V. CRITIQUE AND CONCLUSIONS

Lord Scarman's Interpretation Bill follows basically the same format as the Commissions' draft proposals. Clause (1) deals with aids to interpretation. It sets out various contextual matters which are to be

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118. See para. 19.16.

119. Loc. cit.

included among the matters at present considered "in ascertaining the meaning of any provision of an Act." Two comments can be made on this initial formula alone.<sup>120</sup> First, despite the Law Commissions' duty to codify the law,<sup>121</sup> this was not attempted here. Second, the formula treats statutory interpretation as a one-stage operation. It fails to recognise that there is a preliminary stage to interpretation in which a court decides whether or not a doubt exists. It is only in the second stage that a court determines how the doubt is to be resolved. As F. Bennion notes, interpretative material ruled out of consideration at the second stage may nevertheless be admissible at the first.<sup>122</sup>

Clause (1) begins in paragraph (a) with a consideration of internal indications as to meaning. Only the proposals relating to punctuation need concern us here. As a matter of common sense this should be included. Any reader of English is guided by punctuation. While some old Acts may not have been punctuated when entered on the Parliament Roll, this is no longer the case. Now that punctuation is used in legislation it should be considered in the interpretation of that legislation. The main criticism that can be aimed at paragraph (a) is that it fails to deal with the situation where one of the internal 'indications' contradicts the substantive

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120. See F. Bennion 'Another Reverse for the Law Commissions' Interpretation Bill' New Law Journal, 13th August 1981 p. 840.

121. Law Commissions Act 1965 s.3(1).

122. F. Bennion op.cit. p.840.

text.<sup>123</sup> In Attorney-General v Prince Augustus of Hanover<sup>124</sup> it was held that the text is to be preferred. Not all judges follow this practice, however. Recently in Infrabrics Ltd v Jaytex Ltd<sup>125</sup> the clear meaning of the text was held to be overridden by a narrower heading.<sup>126</sup>

Contrary to the recommendations of the Renton Committee, the 1980 Bill contained a paragraph allowing reference to a report on which the Act was based. This was dropped from the 1981 Bill. Lord Hailsham L.C., had this to say about the movers of the amendment:

"If they really think that courts and practitioners do not read blue books in order to find out what statutes mean, they are living in a complete fool's paradise. When I was at the Bar I was constantly having to advise as to the meaning of statutes and as constantly I was finding, as I do in this House and as I do when I sit judicially, that the words of the Parliamentary draftsman are at first sight incomprehensible . . . I always look at Hansard, I always look at the blue books, I always look at everything I can . . . The idea that this is going to generate a lot of expensive work - dear, dear solicitors, dear, dear barristers, do grow up! " 127

F. Bennion discusses the relationship between Lord Hailsham's comments and certain earlier findings of the Law Commissions.<sup>128</sup> First, the 1969 Report had spoken of the need for an informed construction. Initially "a judge might wish to inform himself about the general legal and factual situation forming the background to the enactment."<sup>129</sup> Such information may throw light

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123. Ibid. p. 840.

124. [1957] AC 436.

125. [1981] 1 All ER 1057.

126. See 131 N.L.J. 749.

127. House of Lords Debate 26th March 1981 Cols 1345-6.

128. F. Bennion op.cit.

129. Law Com. No.21. para 47.

on the passages which to Lord Hailsham are "at first sight incomprehensible". Indeed, "there do not seem to be any specific limitations on the information to which the court might refer,"<sup>130</sup> in gaining this background information. Surprisingly, neither the Interpretation Bill nor the Law Commissions' draft proposals on which it was based made any attempt to differentiate between admissibility of reports for securing an informed construction and their use for resolving doubts as to meaning where these exist. In the latter case, the interpreter must not use the knowledge he has acquired to produce an unexpected result.<sup>131</sup>

On its first introduction to the House of Lords the Interpretation Bill contained two other clauses recommended by the Commissions, but later dropped. The first of these was intended principally to allow reference to white papers and other command papers. The same arguments that apply to committee reports apply to these documents. To admit them as evidence of intention could give rise to many difficulties. In principle "it would seem wrong that a white paper setting out in political terms the broad aims of a government policy, often in vague language, should be allowed to determine the precise legal effect of the legislation."<sup>132</sup>

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130. Ibid. para 48.

131. F, Bennion op.cit.

132. J.H. Farrar, 'Law Reform and the Law Commissions', p. 52.

The second provision was inserted to ease reference to specially prepared explanatory memoranda. Many argue that such material would only create more doubts. Whether this would indeed be the case seems very doubtful. The decision to drop the provision from the 1981 Bill appears to have been based mainly on considerations of cost and convenience.

Context is an essential ingredient of communication. The relevant context must be a shared context; shared between communicator and audience. Here, between Parliament and those to whom its laws are addressed. Even when relevant and reliable, many extrinsic materials are unavailable to the ordinary citizen. For this reason alone they do not form part of the shared context and should not be taken into consideration by the courts when interpreting statutes. To do so would be to place interpretation of the laws of Parliament even further out of the reach of the ordinary citizen, the audience to whom many statutes are addressed.

The arguments against the admissibility of pre-parliamentary material are not as strong as those against parliamentary material. The distinction between admitting the former as evidence of purpose but not of meaning seems an artificial one, and the case for altering the present law is strongest here. Yet

the above reasoning still applies. Such material must first be as readily available as statutes are themselves. Its use must not involve any substantial increase in cost to the ordinary citizen. After all, the assistance gained from its use may only be of benefit in a very small number of cases. Ultimately, any decision must be based on a cost/benefit analysis. At present, the additional benefit of admitting extrinsic materials does not outweigh the consequent cost.

## CHAPTER XIV

## REFORM PROPOSALS

The first Commonwealth jurisdiction to consider reform of the common law approaches to interpretation was Canada in its Revised Acts Act 1886 c.1. s.7. This contained a provision which is the origin of Section 5(j) of the New Zealand Acts Interpretation Act 1924. We have considered this section in detail above. Neither the enactment of the Canadian section nor its New Zealand counterpart seems to have been attended by any detailed debate on the common law position. Indeed their origins remain obscure. The only comprehensive debate that has taken place on the common law position is contained in the Report of the English and Scottish Law Commissions on The Interpretation of Statutes, 1969.<sup>1</sup> Reform in this area had appeared in the First Programme of the Law Commissions as a matter of priority. The Commissions recognised that any reform of the general law which it recommended would have to be implemented through legislation. The successful realisation of the reform programme would then depend on the interpretation given by the courts to that legislation. The importance of this topic for reform could be seen from the increasing number of cases involving statutory interpretation, particularly at the appellate level.<sup>2</sup> However the Report

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1. Law Com. No. 21.

2. Ibid. p.3 n.2.

drew attention to the fact that a statute is not exclusively a communication between the legislature and the courts.<sup>3</sup> It is directed according to its subject matter to audiences of varying extent. The problem, then, was to devise a set of rules or approaches which produced an accurate implementation of legislative policy by the courts and yet at the same time was intelligible to lay people. This did not necessarily mean that the Commissions subscribed to the view that all legislation should be drafted in simple terms. They recognised that the problem is not one capable of any easy solution.<sup>4</sup>

The Report examined the three traditional canons and traced their historical development.<sup>5</sup> Of the three the Commissions favoured the mischief approach although they recognised that it suffered from certain defects. They were sharply critical of the literal approach. It assumed an unattainable perfection in draftsmanship; it ignored the limitations of language; it afforded no solution in cases where the legislation left the courts a limited creative role. Also, it was capable of producing an over-technical result. The golden rule was also criticised. The main criticism was that it set a purely negative standard by reference to absurdity, inconsistency or inconvenience, but provided no clear means to test the existence of these characteristics or to measure their quality or extent. On closer

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3. para. 4.

4. para. 6.

5. paras 22-28.



examination they thought the golden rule to be merely a less explicit form of the mischief approach. The criticisms aimed against the latter were:

- 1) that it does not make clear to what extent the judge should consider the actual language used.
- 2) it assumes that statute law is subsidiary or supplementary to the common law. This may have been true in the sixteenth century but is not necessarily the case today. Statute law often marks a new departure.
- 3) the rule was laid down before the extrinsic evidence exclusion rules were formulated.<sup>6</sup>

Despite these criticisms, the Commissions recommended the enactment of a more updated version of the mischief approach.<sup>7</sup> This was to be in terms of the promotion of the general legislative purpose. Unfortunately the draft clauses, set out in Appendix A to the Report, were worded very badly. The purposive approach was to be "included among the principles to be applied in the interpretation of Acts".<sup>8</sup> This seems to recognise that the common law canons still survive. If so, one is still left with their existing ill-defined relationship to each other. To this is added a further ill-defined relationship with the proposed statutory provision. It is true that clause 2(a) states that a purposive construction is to be preferred to a construction which

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6. For the Commissions' criticism of the three traditional canons see paras 29-33.

7. See para. 81 and Clause 2(a) of the draft proposals.

8. Clause 2(a).

is not so purposive; but the relationship of the purposive approach to the golden rule, and indeed to the old formulation of the mischief rule, is not clear. Presumably the literal approach continues. The summary of conclusions criticised over-emphasis on literal meaning, but this is not necessarily reflected in the wording of the draft clauses.

The Commissions made some general criticisms with regard to presumptions.<sup>9</sup> In their opinion a court is not effectively bound by the presumptions because

- a) there is no established order of precedence in the case of a conflict of presumptions.
- b) some are of doubtful status or imprecise scope.
- c) a court can adopt a construction which is inconsistent with a particular presumption without referring to it and this does not invalidate its decision.
- d) there is no accepted test for resolving a conflict between a presumption and the purpose or policy of an Act.

The meaning of d) is not particularly clear since a presumption would always be rebutted by a clear statement of legislative policy in the Act. It had been suggested to the Commissions that they might attempt some statutory classification of legislation with appropriate presumptions. This was obviously impracticable and the Commissioners contented themselves by recommending statutory presumptions in three difficult areas of interpretation; a presumption of mens rea, a presumption

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9. See paras 34-39.

of an action for breach of statutory duty and a presumption of conformity of domestic legislation with international treaty obligations.

The Commissions examined the general question of context<sup>10</sup> and divided their recommendations between intrinsic and extrinsic materials. Their recommendations on this matter have been discussed in detail above. Briefly, they made detailed recommendations on the former, but in relation to the latter they did not favour a general relaxation of the extrinsic evidence exclusion rules. They were however prepared to recommend the preparation in selected cases of explanatory material to accompany an act and be available for use by the courts.

The Report met with a good deal of professional hostility. Many of its recommendations were condemned as impracticable. Further discussion on the matter of reform was delayed by reason of the negotiations in connection with the Vienna Convention on Treaties, the United Kingdom's entry into the Common Market and a domestic debate over Parliamentary procedures. Then in 1975 the Renton Committee published its Report on the Preparation of Legislation. The Committee agreed with the Law Commissions that a comprehensive new Interpretation Act should be prepared and that a provision, to the effect that a construction promoting the general legislative purpose is to be preferred, might usefully form part of such an Act. It did not think that any general change in the law concerning the admissibility

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10. See paras 40-62.

of extrinsic materials should take place. To admit such material would "place too great a burden on litigants and their advisors, and indeed on the courts."<sup>11</sup> In particular it criticised the Law Commissions' proposal for explanatory memoranda.

In February 1980 Lord Scarman, who as Sir Leslie Scarman had been the Chairman of the English Law Commissions at the time of the Report, introduced an Interpretation Bill into the House of Lords. The Bill basically enacted the Law Commissions draft clauses. After severe criticism on his motion for a second reading Lord Scarman withdrew the Bill. Then in 1981 he introduced a modified, more limited version. A copy of this 1981 Bill is set out in Appendix I to this thesis. The Bill in its new form passed the Lords but was objected to on the motion for a second reading in the House of Commons. It is dead for the present session.<sup>12</sup> The proposed Bill obviously had many opponents. The discussions concerning it highlight current attitudes in the United Kingdom to interpretation generally and warrant some consideration.<sup>13</sup>

In its original form the Interpretation Bill

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11. The Preparation of Legislation - Report of the Renton Committee para. 19.23.

12. See F. Bennion 'Another Reverse for the Law Commissions' Interpretation Bill' New Law Journal, Aug. 13th 1981, p.840. Note also the comments of the First Australian Parliamentary Counsel, written in reply to a letter from J.H. Farrar. G.K.Kolts writes: "... I have recently returned from London where I participated with a colleague in discussions with Lord Scarman and various senior Government officials. It was made quite clear to us that the Bill has been effectively 'killed', at least as far as the present session of Parliament is concerned . . ." (dated 28th July 1981).

13. For general discussion on the Bill see F. Bennion, *ibid.*

contained three main clauses. The first specified various aids to interpretation. These related to the statutory context and have already been discussed above.<sup>14</sup> The second clause set out principles of interpretation and the third laid down a presumption in favour of an action for breach of statutory duty. Lord Scarman regarded the second clause as by far the most important. In its original form this clause laid down two principles of interpretation but a third was added to the 1981 Bill. The first and most important principle was an embodiment of the purposive approach. On the whole its inclusion received a cool response from the House of Lords. F. Bennion has made the following comments:<sup>15</sup>

"In one sense this a statement of the obvious as many critics have pointed out. In another sense it begs question. In order to contemplate applying a construction that would not promote the legislative purpose, the court must have a powerful reason. The most likely reason is that this is the clear literal meaning. Does the principle override the literal meaning in all cases, or only when the literal meaning is doubtful? The latter (assuming an informal construction) seems to be the present law."

Many of the Lords regarded the provision as saying nothing more than what is presently the law. Lord Simon of Glaisdale described the clause as "declaratory of the better practice of the courts."<sup>16</sup> Some thought that, being declaratory, the provision could do no harm, while others thought that there was no need for legislation on the subject at all.<sup>17</sup>

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14. See pp. 207-211.

15. In his article on the Bill, op.cit. p. 841.

16. House of Lords Debate 9th March 1981 Col. 78.

17. See e.g. Viscount Dilhorne at Col. 198, House of Lords Debate 13th February 1980.

The second principle of interpretation concerned the comity of notions. Like the above principle, this too states existing law. But it is perhaps even less in need of legislative expression since the judicial dicta are not in conflict.<sup>18</sup> Little was said about this second principle in the debates. Nor was much said about the third principle, added in 1981, and dealing with retrospectivity. F. Bennion considers that, although apparently simple and harmless, the provision in fact papers over the difficulties that arise in practice.<sup>19</sup>

The 1980 Bill included a further clause to the effect that where a future act imposes a positive or negative duty, it is to be presumed, unless the act expressly negatives this, that any person who sustains damage by breach of the duty is entitled to sue for damages or other civil remedy.<sup>20</sup> Little was said in the debates about this clause apart from comments by Lord Elwyn-Jones and Viscount Dilhorne. Both considered the clause to be too wide. The clause was dropped from the 1981 Bill.

Objections to the Bill have been based generally on one of two grounds. Some regard the whole topic of statutory interpretation as unsuitable for legislative enactment. Others have criticised the inadequacy of the Bill. Many questions are left unanswered. F. Bennion

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18. See F. Bennion *op.cit.* p.842.

19. *op.cit.* p. 842.

20. Note that in the 1969 Law Commissions Report the inclusion of such a clause was justified on the ground that the existing law on the subject was rather uncertain. Lord Diplock's exposition of the law in Lonhro v Shell Petroleum [1981] 2 All ER 456 has largely clarified the position.

sums up this criticism in the following passage from his article:

"The fact is that this subject is much too complex to be tidied up by one or two simple clauses. Instead of a handful of general principles it needs a large number of carefully-constructed statements each going no farther than it is practicable to go, and each dovetailing with the others. In other words a full-scale code. Failing this, the view of most people who have considered the Bill appears to be that we will do better if we continue to rely on judicial development." 21

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21. F. Bennion op.cit. p.842.

Current awareness of the need for reform in the area of statutory interpretation is not confined to Britain. In Australia, legislation providing for the insertion of a purposive clause into the Australian Acts Interpretation Act 1901 was introduced into Parliament by the Attorney General on 27th May 1981. At the same time the Attorney General foreshadowed proposals to allow the courts to take into account an explanatory memorandum approved by Parliament as an aid to interpretation.<sup>22</sup> A new Section 15 AA(1) was inserted by the Statute Law Revision Act 1981 and came into operation on 12th June 1981. The section reads as follows:

"15AA(1). In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(2) Nothing in sub-section (1) shall be construed as authorizing, in the interpretation of a provision of an Act, the consideration of any matter or document not forming part of the Act for any purpose for which that matter or document could not be considered apart from that sub-section."

Sub-section (1) follows the same general form as Lord Scarman's proposed purposive clause. Note, however, that the Australian provision talks of the purpose "underlying the Act" whereas the United Kingdom provision referred to the purpose "underlying the provision". The Australian clause thus follows the form favoured by the Renton Committee. The clause is designed to operate

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22. See 'New Guidelines For The Interpretation of Commonwealth Laws' p.1. - a pamphlet issued by the Attorney General when the amendment to the Acts Interpretation Act received Royal Assent.



alongside the existing rules of construction. No doubt these will continue to be used where they assist in ascertaining the legislative intention. However, where two alternative constructions are open, the one that promotes the statutory purpose is to be preferred to one which does not. Sub-section (2) stresses that the law relating to the admissibility of certain material as part of the statutory context is in no way altered by the first part of the provision.

In introducing the legislation Senator Durack, the Attorney General, spoke of the need for such a provision:

"The effect of the provision to be inserted in the Acts Interpretation Act will be to confirm that in interpreting provisions regard is to be had to the object or purpose underlying the Act in question.

I am not among those who would say that the general approach of our Courts is at present overly legalistic, but I do think that there is scope for expressly stating that the statutes we make are to be interpreted in a purposive manner. Tax decisions constitute a topical and important example that will come readily to all Senators' minds, but the matter has wider implications that extend to many other statutes." 23

Senator Durack went on to discuss future reform proposals relating to the use of explanatory memoranda and committee reports:

". . . Explanatory material is often provided by the Government to assist senators and members, and subsequent users of legislation.

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23. The Attorney General's second reading speech, quoted in 'New Guidelines for the Interpretation of Commonwealth Laws' at p.1.

The material is of particular value where legislation is complex or specialized in subject matter or both . . .

I think we need to consider placing this practice on a more regular basis, even to the extent of having an explanatory memorandum approved by the Parliament and able to be taken into account by the Courts in interpreting difficult provisions in the Act. The memorandum could not and would not be controlling. However, apart from contributing to the ease with which an Act can be understood by the public as well as by senators and members, such a practice offers the hope that the draftsman, when faced with the difficult choice of either using general language which might, however, leave the Courts without sufficient guidance, or introducing lengthy detailed provisions, could feel some security in choosing the former course if he knew that a memorandum approved by the Parliament would embody its intent . . . . The fear has been expressed that the use of extraneous materials such as reports and explanatory memoranda will increase the cost and length of legal proceedings. Certainly the possible disadvantages have to be considered and weighed against the benefits that would flow from the use of such materials. The time has come, however, when the matter should be fully explored and I take the opportunity of stating to the Senate that I propose to do so with a view to developing specific proposals that can be brought into the Parliament for further consideration . . . " 24

It will be interesting to see the reception of such proposals.

## PART C: JUDICIAL APPROACHES TO MEANING - THE PRACTICE

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### Introduction

In Part A of the thesis we looked at the nature and ascertainment of meaning from a semantic and philosophical point of view. In Part B we considered legal approaches to meaning. In particular we considered statements of principle by the judiciary and legal academics. We saw that interpretation has traditionally been subject to theoretical classification into three main 'rules'; the literal, golden and mischief rules. More accurately these are described as approaches to meaning. The modern tendency has been to amalgamate these traditional approaches. The 'ordinary meaning' approach has been combined with a fuller understanding of the influence of context and indeed of statutory purpose. From a semantic point of view this tendency has much to recommend it. The application of one of a number of rigid and distinct 'rules' is a totally inadequate means by which to ascertain meaning.

Having considered the theory of judicial interpretation, it remains to consider actual judicial practice. The object of Part C is to consider how judicial practice measures up to the linguistic and legal theory discussed above. Evidence of judicial practice is taken from a survey of two years of the New Zealand Law Reports; 1958 and 1978. A total of two hundred cases involving statutory construction have been read and analysed.

## CHAPTER XV

## THE SURVEY

## I. PURPOSE OF SURVEY

The purpose of the survey was

- 1) to determine whether in the cases considered the judges in fact applied the traditional canons of interpretation,
- 2) to determine which of the canons they applied most frequently and whether there was any significant change in the reported cases between 1958 and 1978,
- 3) if the judges did not apply the traditional canons, to determine on what basis they made their decision,
- 4) to determine the use made of section 5(j) of the Acts Interpretation Act 1924 and whether there was any significant change between 1958 and 1978.

## II. METHOD

The basic method used in the survey was an examination of every case involving statutory interpretation in the two years under consideration. Thus the survey was based on the 'total population' of statutory interpretation cases in these years in the sense that a volume of reported cases can be regarded as a single unit and the statutory interpretation cases as a sub unit. It was both possible and practicable to survey the whole of this population. 1978 was taken as a recent year and

1958 as a period twenty years earlier. It was assumed that twenty years was a reasonable period for ascertaining any significant change in approach. A statistician might possibly have adopted a more sophisticated methodology but as a non-statistician it was difficult to see how a more useful survey could have been carried out on the basis of random sampling. It seemed more sensible to take every case in two particular years than sample cases over a number of years. One main reason for this is that not every case reported necessarily involves statutory interpretation. Also, random sampling could give a misleading indication of judicial approach. Taking the total population is more likely to show the judges dealing with a range of subjects and adopting a range of approaches. Given the smallness of the total population involved it is unlikely that random sampling would give an adequate spread of subject matter.

The initial system of classification adopted was as follows:

- (1) Year, Page, Name of Case
- (2) Court, Judge/s
- (3) Type of Statute

Under this heading the main system of classification followed was basically that used in New Zealand legal education.<sup>1</sup>

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1. The classification of statutes adopted in the New Zealand Law Reports itself was far too detailed for the purpose of the survey. This classification comprised approximately fifty categories and was intended for index purposes.

(4) Issue and Ratio

The issue was ascertained from reading headnotes and the judges' summary of counsel's arguments. Goodhart's criterion of ratio decidendi was adopted, i.e. a principle based on the material facts of a case.

(5) Type of Uncertainty

A system of division into the major linguistic sources of uncertainty (vagueness and open texture, ambiguity, generality) was originally adopted.

(6) Meaning Versus Application

The distinction between interpretation and application made by writers such as Reed Dickerson<sup>2</sup> was adopted as the basis of this heading.

(7) Approaches Adopted: Literal, Golden, Purposive

The broad heading 'purposive' was adopted instead of 'mischief' to cover cases where the judges used the former without making express reference to the old formulation of the mischief rule. In the survey's original form each approach was further divided into express and implied applications. It was felt that in some cases a particular canon was implicit in the court's decision although not stated expressly. For example, a reference to the meaning being 'ordinary' or 'plain' has been taken as an application of the literal rule.

(8) Section 5(j) or Other Sections of the Acts Interpretation Act.(9) Application of Presumptions

Under this heading were noted cases decided

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2. In 'The Interpretation and Application of Statutes'.

primarily on the basis of some legal presumption. No note was made of cases where reference to a presumption was merely ancillary to a decision based on other grounds.

(10) Use of Definitions

This is a broad category which includes statutory definitions, dictionary definitions and judicial definitions including definition by means of a test.

(11) Comments by Court on the Relevance of Context

This heading was incorporated primarily for personal reference and for use in Parts A and B of the thesis.

(12) Relevance of Policy Factors

No deep analysis of policy was engaged in. The reason for this heading was simply to identify when policy factors were clearly a relevant consideration in the decision-making process.

(13) Use of Precedent

Cases were noted where the court's decision was based largely on judicial dicta in previous cases.

### III. PROBLEMS

1) Difficulty was often encountered in formulating the ratio decidendi. Furthermore, this particular heading did not seem to have much bearing on the object of the survey.

2) The division of cases on the basis of linguistic uncertainty proved difficult to carry out and was eventually dropped. Decisions seemed to involve something more than a simple resolution of problems of meaning in

the abstract. The difficulty of classification was in large part also due to (3).

3) The meaning/application distinction seemed to be unworkable in practice and was dropped.<sup>3</sup> The courts did not seem to apply this distinction consistently themselves, although wider pragmatic considerations were taken into account in many cases.

4) The division of the canons into express and implied applications proved difficult. In practice it was impossible to discern in all cases whether the judges had particular canons in mind when no express reference was made to them using the usual terminology. Since the canons do not necessitate decisions, in retrospect this is not surprising. In the final analysis of the survey this distinction was dropped except for a category recognising an implied purposive approach. This category was used where there was some reference indicating attention to the statutory purpose or policy. This was a type of implied application that was easy to discern. It should be borne in mind therefore that not all cases tabulated as applying a particular canon did so expressly.

#### IV. ANALYSIS

##### (1) Type of statute giving rise to problems of interpretation

1958

Out of a total of 164 cases, 113 cases involved

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3. Cf. the theoretical difficulties of this distinction.  
See p. 92.



an issue of statutory interpretation. The division of these cases into subject headings is as follows:

Crimes	Family	Tax	Coy/ Commercial	Land	Public
8	18	10	7	21	18

Procedure	Equity	Tort	Industrial	Transport
14	6	1	6	4

### 1978

Out of a total of 137 cases, 87 cases involved an issue of statutory interpretation. The division of these cases into subject headings is as follows:

Crimes	Family	Tax	Coy/ Commercial	Land	Public
22	17	5	10	2	9

Procedure	Equity	Tort	Industrial	Transport	Other
9	2	1	2	5	3

### (2) Approaches adopted - particular class of statutes

1958

	LITERAL	GOLDEN	PURPOSIVE	SECTION 5(j)
Crimes	0	1	1	0
Family	4	1	1	1
Tax	4	1	1	0
Coy/ Commercial	1	0	2	0
Land	6	1	1	1
Public	6	1	3	2
Procedure	3	0	1	0
Equity	2	0	0	0
Tort	0	0	0	0
Industrial	1	0	0	0
Transport	0	1	0	1

	IMPLIED PURPOSIVE	NO CLEAR RULE	PRESUMPTION
Crimes	0	6	0
Family	1	13	0
Tax	0	6	0
Coy/ Commercial	0	5	0

	IMPLIED PURPOSIVE	NO CLEAR RULE	PRESUMPTION
Land	0	12	1
Public	0	7	0
Procedure	1	9	0
Equity	0	4	0
Tort	0	1	0
Industrial	0	5	0
Transport	0	1	1

1978

	LITERAL	GOLDEN	PURPOSIVE	SECTION 5(j)
Crimes	11	1	3	0
Family	3	0	1	0
Tax	0	1	0	0
Coy/ Commercial	1	1	4	0
Land	0	0	0	0
Public	4	1	3	0
Procedure	3	0	2	0
Equity	0	0	1	0
Tort	1	0	0	0
Industrial	2	0	0	0
Transport	4	0	1	0
Other	1	0	1	0

	IMPLIED PURPOSIVE	NO CLEAR RULE	PRESUMPTION
Crimes	3	7	1
Family	2	12	0
Tax	0	4	0
Coy/ Commercial	0	5	0
Land	0	2	0
Public	1	1	1
Procedure	0	5	0
Equity	0	1	0
Tort	1	0	0
Industrial	0	0	0
Transport	0	1	0
Other	0	1	0

(3) Approaches adopted - general totals and percentages

1958

	LITERAL	GOLDEN	PURPOSIVE	SECTION 5(j)
GENERAL TOTAL	27	6	10	5
PERCENTAGE OF TOTAL CASES ON INTERPRET- ATION OF STATUTES	23.9	5.3	8.8	4.4

	IMPLIED PURPOSIVE	NO CLEAR RULE	PRESUMPTION
GENERAL TOTAL	2	69	2
PERCENTAGE OF TOTAL CASES ON INTERPRET- ATION OF STATUTES	1.8	61.1	1.8

1978

	LITERAL	GOLDEN	PURPOSIVE	SECTION 5(j)
GENERAL TOTAL	30	4	16	0
PERCENTAGE OF TOTAL CASES ON INTERPRET- ATION OF STATUTES	34.5	4.6	18.4	0

	IMPLIED PURPOSIVE	NO CLEAR RULE	PRESUMPTION
GENERAL TOTAL	7	39	2
PERCENTAGE OF TOTAL CASES ON INTERPRET- ATION OF STATUTES	8	44.8	2.3

(4) Further analysis of cases applying no clear  
'rule' or canon of interpretation:

1958

Out of the 69 cases applying no clear canon of  
interpretation:

- 19 were based on precedent (of which one was decided on the basis of a definition laid down in a previous case, and two were based on analogy from the meaning given to similar words in another Act).
- 18 involved an exercise of discretion.
- 11 seemed to involve application only.<sup>4</sup>
- 3 applied common law principles.
- 3 were based on definitions laid down by the judge (of which two definitions were by means of a test).
- 1 was based on 'common sense'.
- 1 applied principles applicable to another statute by way of analogy.

#### 1978

Out of the 39 cases applying no clear canon of interpretation:

- 14 involved an exercise of the court's discretion.
- 11 seemed to involve application only.
- 3 were based on precedent (of which one was decided on the basis of a definition by test which was laid down in the previous case).
- 3 were based on definitions laid down by the judge (of which one definition was by means of a test).
- 3 were based on clear policy considerations.
- 1 was based on 'common sense'.

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4. Although the interpretation/application distinction did not seem to be generally applicable and a consistent analysis along these lines was dropped from the survey, there did seem to be a few cases that could be explained in terms of application.

## CONCLUSIONS

The aims of the survey were, broadly, to analyse from the cases surveyed the frequency of application of the traditional canons of interpretation, to determine the use made of Section 5(j), and to determine the basis of decision in those cases where neither the canons nor Section 5(j) featured as an acknowledged part of the judicial reasoning. An attempt was made to detect changes and trends over the twenty year period from 1958 to 1978.

As far as the canons are concerned, it is interesting to note an increase in application of both the literal and purposive approaches in 1978; the latter approach showing the greater increase. Application of the golden rule seems to have remained relatively constant. More interesting still is the number of cases in both years where no clear rule or canon of interpretation seems to have been applied by the judges. This category included the majority of cases in 1958 but ranked approximately equal to the number of cases adopting a literal approach in 1978. Several factors formed the basis of judicial decision making in these cases; among them reliance on precedent, the exercise of a discretion, the application of common law principles, the application of a definition, analogy, policy considerations and common sense. A sizeable proportion of the cases seemed to involve an issue of application and were not specifically concerned with interpretation as such. The notable decline in cases

based primarily on precedent has already been commented on.<sup>1</sup> The sizeable increase in the percentage of cases involving an exercise of discretion is consistent with current trends in legislative drafting. Finally the lack of cases making express reference to Section 5(j) is of interest, although not necessarily surprising.<sup>2</sup>

Are these findings reconcilable with the conclusions already reached in Parts A and B of the thesis? In Part A emphasis was placed on those aspects of language likely to give rise to a problem case of interpretation and on those factors necessary for the satisfactory resolution of linguistic doubt. In particular emphasis was placed on context and its fundamental importance for the ascertainment of the meaning of both clear and doubtful provisions. In Part B the theory of judicial interpretation was considered; in particular the use of so-called 'rules' or canons of interpretation. Upon closer examination each of these 'rules' proved to be of only limited adequacy as an index of statutory meaning. This conclusion is consistent with and even supported by the finding that frequently no reference was made to the canons in the course of judicial decisions. Arguably this omission could result from recognition of this inadequacy. It would seem that judges of late are becoming increasingly aware of certain fundamentals of linguistic theory as well as the inadequacy of traditional reasoning patterns.

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1. See p. 91.

2. See comments on the application of Section 5(j) by J.F. Burrows in 'The Cardinal Rule of Statutory Interpretation in New Zealand' [1969] 3 N.Z.U.L.R. 253.



The recent recognition by some judges of linguistic register and its effect on ordinary meaning is one indication of this first development.<sup>2a</sup> The frequency of judicial reference to the relevant statutory context is another. The further the traditional canons are seen to diverge from modern linguistic theory, the less plausible they are as reasons for meaning. Alternatively, it could be that many of these cases just did not lend themselves to the application of a canon anyway. This is the most probable explanation in cases involving the exercise of a discretion and, by definition, in cases involving an issue of application only.

Where the canons were cited, it was often difficult to categorise decisions under the traditional three-fold classification. Either this has always been the case and the traditional classification was from the start a misconception of actual judicial practice, or there has been some change over the years in the nature and content of the canons. While it would be difficult to prove the former, the conclusions reached in Part B certainly support the latter proposition. The literal rule no longer supports a narrow, isolationist approach to the meaning of statutory words: ordinary meaning must be determined in light of the relevant statutory context, arguably even the statutory purpose. The golden rule, even if originally applicable only to cases involving some internal inconsistency, now extends to cases where the consequences of adhering to the

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2a. For example see Lord Simon of Glaisdale in Maunsell v. Olins [1975] AC 373, 391E.

ordinary meaning of words are considered absurd.<sup>3</sup> The somewhat outdated mischief rule has now been superseded by the more modern purposive approach. The distinction between the traditional canons has become blurred; they have begun to merge. E.A. Driedger concludes that the canons have been completely amalgamated into one uniform approach to interpretation.<sup>4</sup> As yet this would appear to be an overstatement of judicial practice in New Zealand. There is no doubt however that the traditional canons are undergoing a change in formulation.

The finding that only a few cases make express reference to Section 5(j) is consistent with the conclusion reached by J.F. Burrows that Section 5(j) is little used by the New Zealand judges.<sup>5</sup> This does not necessarily mean that the judges are uninfluenced by the section which basically represents a statutory codification of the mischief approach. Arguably the section also represents an attempt by the legislature at codification of acceptable judicial attitudes in relation to legislation in a modern society. As such the section could well be largely taken as read insofar as it is useful and ignored where it is not. Its very generality permits both possibilities. It is impossible to tell whether the increase in cases applying a purposive approach is a direct consequence of Section 5(j) or whether the same trend would still be apparent regardless of legislative intervention. In Britain and other

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3. Compare this with the position adopted by E.A. Driedger. See pp. 138-141.

4. See p. 157.

5. J.F. Burrows 'The Cardinal Rule of Statutory Interpretation in New Zealand' *op.cit.* p. 256.

Commonwealth jurisdictions a similar trend certainly seems to be apparent in the absence of such a provision.

Several implications of a more general nature arise from these findings. If the canons often are not cited, what is their function in those cases where they are cited? Ultimately this leads to questions concerning the true basis of judicial decision making in cases involving statutory interpretation. Does the fact that the canons need not be cited mean that they are useless and merely cited gratuitously? There are three possible alternatives; first, one could argue that the canons are of no real use, second that they are of some use and third, that the canons necessitate decisions. Clearly the latter proposition is an untrue statement of their juridical nature - the canons are not true 'rules' and do not necessitate decisions even in the loose sense that legal rules can be said to necessitate decision. Since in many cases the canons are used one must infer that they are of some use; the first proposition is therefore unlikely. The question is, what use do they have? The canons are not the cause of a decision.<sup>6</sup> Ultimately this will be the result of practical reasoning and will have its origins in evaluation.<sup>7</sup> Acting within the limits set by the statutory words the judge will try to give effect to what is in practice a 'reasonable' result not only for the litigant but for society as a whole.

Judicial decisions in the problem case will thus inevitably involve an element of creativity. Whereas one

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6. Cf. A. Ross 'On Law And Justice' pp. 136-138.

7. Ibid.

can realistically describe the judicial function solely in terms of cognition in the so-called clear case of interpretation where a pre-existing rule of law is readily identified and applied, it is unrealistic to do so in the problem case. Arguably in such a case there is no pre-existing rule of law covering the case at hand.<sup>8</sup> Instead there is a dispute about what the appropriate rule may be and the court's function is to choose the appropriate form and content of that rule. The court does not discover a pre-existing norm, it creates one. Similarly in the penumbral case the court decides whether the particular facts before it are included or excluded from the relevant statutory rule. In making its decision the court is in fact redefining the rule; by redefining the rule, the court creates a new rule.<sup>9</sup>

This constructive element in decision making is rarely acknowledged by the judges. Terms such as 'interpretation' which imply a purely cognitive search for some pre-existing meaning tend to obscure the true nature of the judicial function.<sup>10</sup> There are two main reasons for this hesitance to admit creativity. First, the doctrine of separation of powers has largely been responsible for the myth that judges do not legislate.<sup>11</sup> As legislation is supposed to rest primarily in the hands of a democratically elected Parliament, the suggestion easily arises that it might be improper for judges to be creative. This, we

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8. See R.B. Seidman 'The Judicial Process Reconsidered In The Light of Role Theory' (1969) 32 MLR 516, 521.

9. Ibid. p.522.

10. See B. Abel-Smith and R. Stevens 'Lawyers and The Courts' p. 289.

11. See R.B. Seidman op.cit. pp. 529-530.

have seen, is a naive and simplistic view of the judicial function. Second, the judges appear to be influenced by a general intellectual scepticism about decisions involving value considerations. Such decisions, it is supposed, are essentially subjective in nature and possibly the result of individual emotion. At the very least they might result from the political and social bias of the judges.<sup>12</sup> This seems to strike at one of the fundamentals of adjudication, namely impartiality. The fact that the views of the judges on value questions are often out of touch with the views of society as a whole, coupled with the fact that these views can be backed up by force and the paraphernalia of law, serves to increase scepticism. Such arguments are based on a misunderstanding of the true nature of evaluation and of practical reasoning in general. These are not necessarily arbitrary processes.<sup>13</sup> The judge's decision must accord with the existing legal and social framework as indicated by the surrounding 'clear' law. In the great majority of cases the scope for judicial choice is narrow and the values involved instrumental rather than ultimate. Usually there will be consensus on the more general values to be served.<sup>14</sup> The judges however have not been unaffected

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12. See B. Abel-Smith and R. Stevens op.cit. Chapter XI.

13. For a discussion of judicial reasoning and subjectivity scepticism see R.S. Summers 'Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification' (1978) 63 Cornell Law Rev. 707. Summers identifies three strands to subjectivity scepticism which he calls the "value-plurality" thesis, the "no-shared values" thesis and the "value-indeterminacy" thesis. In relation to each of these he tries to show that judicial reasoning is not an arbitrary process.

14. See R.B. Seidman op.cit. p.525.

by the prevailing scepticism and criticism. It is not surprising that they are hesitant to acknowledge the creative element in their decisions.

It is with this background in mind that the true nature and function of the canons becomes apparent. Because the judicial function is commonly expressed in terms of a rational search for some pre-existing meaning, the canons are conventionally put forward as reasons for decision. In fact it is possible to regard them either as reasons for meaning or as reasons for decision. Arguably the two are different in logical status although either function could be fulfilled by the same canon. The term 'reason' here is used in the sense of 'justification' and not in its alternative sense of 'cause'.

In Part B the canons were assessed as an index of statutory meaning. While their logical status could broadly be described as 'reasons for meaning', it was obvious that they were of only limited adequacy in this capacity; but to talk about the canons en masse as having a single legal or rhetorical function can be deceptive. Different canons have different justificatory functions. The literal approach indicates presumptive meaning resting on the ordinary meaning of words and, in this sense, it is an index of meaning. The golden rule, on the other hand, is as much concerned with evaluation of consequence as with presumed meaning. In this way it functions largely as a reflexive approach to meaning and more as a reason for decision. Finally the mischief rule represents an

historical or, more accurately, a continuum<sup>15</sup> approach to interpretation - it requires consideration not only of the past 'mischief', but also the present 'remedy' and how it can best be interpreted to accord with the statute's purpose as regards future actions. In the sense that the legislature is presumed to intend a meaning that promotes the statutory purpose, this too can be described as an index of statutory meaning.

An alternative is to express the canons as 'reasons for decision.' While not the motivating cause of a decision, they certainly provide justification for that decision. In the words of Alf Ross, the canons provide a "facade of justification",<sup>16</sup> they form part of the "technique of argumentation" used by the judge to make it appear that his decision was arrived at objectively and is covered by the "meaning of the statute" or the "intention of the Legislature".<sup>17</sup> The American Max Radin expressed the same sentiments in the following passage:

"The maxims are not really 'rules' in the sense that they require us to reach one result rather than another in the application of a statute to an action at law, but they do constitute a vocabulary and a method of presentation when for reasons entirely apart from those 'rules' and their 'exceptions' a result of some kind is reached in the effort to know whether any act is prohibited or permitted under a statute." 18

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15. Cf. R.W.M. Dias 'Jurisprudence' 4th ed. Dias talks about present and continuum time frames in relation to legal theory.

16. A. Ross, op.cit. p. 152.

17. Ibid. p. 152.

18. M. Radin, California Law Rev., 33, 219.

Hart and Sacks<sup>19</sup> have described the canons as answering the question of whether a particular meaning is linguistically permissible, if the context warrants it. Similarly, Alf Ross describes the canons as circumscribing the freedom of the judge by determining the area of "justifiable solutions."<sup>20</sup> In view of the fact that in practice the courts often do not apply any canon at all these comments are too widely stated. Either they need qualification to account for this fact or one has to resort to inference that the canons are still tacitly accepted as defining the scope of the inquiry. Arguably it is possible to make this inference if the court does nothing inconsistent with the canons and, as we have seen, in some cases this implication seems to be a reasonable assumption.<sup>21</sup> It should also be noted that as flexibility within the individual canons allows them to be used to reach quite contrary results, the area of "justifiable solutions" will be a wide one.

If evaluation of consequence is regarded as a proper and integral part of practical decision making then, in order to be an adequate source of reasons for decision, the canons must account for this evaluation. Arguably, the golden rule is the only canon which provides for an explicit assessment of the consequences of an interpretation, and this by its very nature is limited to the exceptional case. The traditional canons are thus not only of limited adequacy as reasons for meaning, but inadequate as necessary

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19. Hart and Sacks 'The Legal Process'.

20. A. Ross op.cit. p.153.

21. See p.230.



and sufficient reasons for decision.<sup>22</sup> Their utility as reasons for decision is as one of a cumulative set of reasons pointing in a particular direction.

Where the canons were cited in the course of decision making their nature and content appears to have undergone a change. Although Driedger's 'amalgamated approach' is as yet an overstatement of judicial practice in New Zealand, there does seem to be a move towards a more unified and consistent approach to interpretation. This, together with the fact that the traditional canons frequently are not cited at all, raises further implications for the law of statutory interpretation. It is submitted that the cases reveal a shift in the dominant paradigm applicable to the construction of statutes.<sup>23</sup> The traditional canons are in the process of being replaced by a new paradigm whose features include a presumption in favour of ordinary meaning, a liberalisation of context to include the statutory purpose and a long-stop measure to avoid possible injustice and absurdity.

The finding that the traditional canons often were not cited is consistent with this submission. In 1958 the number of these cases were greater than in 1978. Arguably

22. Cf. Joseph Raz, 'Practical Reason and Norms,' Raz does not deal with such practical matters as interpretation of statutes. He does not discuss reasons for meaning but he has a category of auxiliary reasons which serves to identify an act which there is reason to perform. (p.34). The canons can perhaps be regarded as a species of reason identifying the statutory rule. When used as a reason for decision the canons can perhaps be regarded as second order reasons i.e. reasons to act for the reasons contained in the statutory rule (Ibid. p.39). There is a logical difference between the two types of function.

23. For a discussion of dominant paradigms in relation to language in general see pp. 10-11.

the 1958 figures reflect a growing dissatisfaction with the traditional formulation of the canons. During the twenty years until 1978 a clear development in judicial approach was apparent. The judges became increasingly aware of certain fundamentals of linguistic theory and the need for some conformity between this and judicial theories of interpretation. In 1978 cases adopting both 'literal' and 'purposive' approaches increased in number and those applying no clear rule were reduced. These increases accord with the liberalisation of the literal rule and the increasing regard for context, including statutory purpose - the increase in cases adopting the ordinary meaning of words does not reflect a return to a stricter approach to interpretation.

Unlike Driedger who claims an 'amalgamated approach' to be already operational as the basis of interpretation,<sup>24</sup> it is submitted that the paradigm shift has not yet been fully worked out by the courts. This is indicated both by judicial practice (in 1978 there still existed cases adopting the traditional formulation of the canons) and by theory. Complete adoption of the new paradigm would only be possible after certain differences of opinion have been resolved. If the dominant approach to interpretation is to be one where the ordinary meaning of words is determined only after a full consideration of the immediate context and the statutory purpose, then agreement must be reached on the means by which this purpose is to be ascertained. It is on this question of the admissibility

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24. E.A. Driedger 'The Construction of Statutes'.

of extrinsic evidence that judicial attitudes most clearly diverge. While some judges<sup>25</sup> are prepared to liberalise the present law, others<sup>26</sup> are strongly opposed to any reform at all.

Any paradigm must be rational in the sense of possessing the characteristics of logical consistency, conceptual coherence and explanatory power.<sup>27</sup> The standard of logical consistency requires that the logical consequences of a theory should harmoniously coexist and should not exclude each other.<sup>28</sup> Not only is the traditional formulation of the literal rule largely contradictory to that of the mischief rule, but the relationship between the mischief and golden rules is itself ill-defined. By comparison the elements of the new paradigm relate to each other with no contradiction or overlap. To be conceptually coherent a paradigm must not offend common sense and generally accepted views as to the nature of language.<sup>29</sup> As we have seen the new paradigm is arising out of the logical inconsistency and incoherence of the traditional canons. Finally, a paradigm must offer a possible solution to the problem that prompted it.<sup>30</sup> What appears to be the outline of the new paradigm suggests a greater explanatory power than previously existed.

In addition to the formal requirements of rationality, a paradigm applicable to the interpretation of statutes must be capable of functioning as a source of

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25. For example, Lord Scarman, House of Lords Debate, 13th February 1980.

26. For example, Lord Diplock, House of Lords Debate, 13th February 1980.

27. See J. Kekes 'A Justification of Rationality', p. 133.

28. Ibid. p. 135.

29. Cf. Ibid. pp. 149 et seq.

30. Ibid. p. 153.

reasons for meaning and reasons for decision. Individually the traditional canons are of limited adequacy as either. The new paradigm, with its recognition of the importance of context and its wider understanding of the nature of ordinary meaning, comes much closer to accepted linguistic theory. Arguably judicial interpretation is a specialised branch of practical reasoning. To be an adequate source of reasons for decision the new paradigm must recognise practical reasoning and evaluation to be the true basis of judicial decision making. This it would seem to do with its explicit provision for an assessment of the consequences of interpretation.

Despite the fact that the new paradigm comes nearer to affording adequate reasons for meaning it is doubtful whether the theory and practice of judicial interpretation could ever be wholly acceptable to the linguist. The judicial function is very different from that of the linguist, or the philosopher, or even the legal academic, and does not lend itself to analysis solely in terms of linguistic considerations. Ultimately a judge must administer justice in the case before him and justice is not always advanced by adhering strictly to the natural linguistic meaning of the statutory text.

A final question remains for New Zealand law. How does the evolving case law paradigm differ from Section 5(j) and why has Section 5 (j) not represented the new paradigm? The main difference is that whereas the new paradigm attempts to provide a comprehensive and consistent guide to the meaning of a statute, Section 5(j) seems to deal

with only one of the elements covered by the new paradigm. The section makes it clear that the statutory purpose is part of the context in which all words are to be read but, like the mischief rule itself, fails to make clear the degree of importance to be placed on the actual statutory words. Similarly, although it gives more scope for a court to do justice, in its terms the section omits to make explicit provision for an assessment of the consequences of an interpretation. Perhaps the most important reason why Section 5(j) has not been adopted as the new paradigm is that in its present form it is of no real assistance in the interpretation of obscure provisions. It is therefore incapable of offering a solution to all the problems that prompted it. The section operates alongside existing rules governing the admissibility of extrinsic evidence. If there is no evidence of Parliament's object apart from the words of the statute, it (begs the question) to instruct a court to interpret the words so as to effectuate Parliament's object.<sup>31</sup> This illustrates perhaps the dangers of legislative reform. While not necessarily agreeing that statutory interpretation is a 'non-subject', one can perhaps ultimately agree with Lord Wilberforce that it is "a matter for educating the judges and practitioners and hoping that the work is better done."<sup>32</sup>

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31. See J.F. Burrows 'The Cardinal Rule of Statutory Interpretation in New Zealand' *op.cit.* p. 278.

32. House of Lords Debate 16th Nov. 1966. Col. 1294. Cf. this with a later speech of Lord Wilberforce on the Interpretation of Legislation Bill - House of Lords Debate 13th Feb. 1980. Col. 277.

Postscript

Since the typing of this thesis, the House of Lords have once again considered the matter of reference to parliamentary materials in the interpretation of statutes; see Hadmor Productions Ltd. and Others v. Hamilton and Others, The Times Law Report, February 16th 1982.

In the course of his speech Lord Diplock, with whom all their Lordships agreed, took exception to a passage in the judgement of Lord Denning in the Court of Appeal in which, his Lordship said: "The Master of the Rolls . . . sought to justify the construction that he placed on section 17(8) [of the Employment Act 1980] by referring to the report in Hansard of a speech made in the House of Lords by a peer, who is a distinguished academic lawyer, Lord Wedderburn, when moving an opposition amendment (which was defeated) to delete the subsection from the Bill.

"There is a series of rulings by this House unbroken for a hundred years . . . that recourse to reports of proceedings in either House of Parliament during the passage of a Bill that upon the signification of the Royal Assent becomes the Act of Parliament that falls to be construed, is not permissible as an aid to its construction."

# APPENDIX I

*Interpretation of Legislation [M.L.]*

A

## B I L L

[AS AMENDED IN COMMITTEE]

INTITULED

An Act to make provision for certain additional matters A.D. 1981  
to be considered and principles to be applied in  
interpreting Acts of Parliament and other instruments.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and  
with the advice and consent of the Lords Spiritual and  
Temporal, and Commons, in this present Parliament  
assembled, and by the authority of the same, as follows:—

5 1.—(1) In ascertaining the meaning of any provision of an Act, Aids to  
the matters which may be considered shall, in addition to those interpretation.  
which may be considered for that purpose apart from this section,  
include the following, that is to say—

- 10 (a) all indications provided by the Act as printed by authority,  
including cross-headings, punctuation and side-notes,  
and the short title of the Act;
- 15 (b) any relevant treaty or other international agreement  
which is referred to in the Act or of which copies had  
been presented to Parliament by command of Her  
Majesty before the time when the Act was passed, whether  
or not the United Kingdom were bound by it at that time;
- (c) any provision of the European Communities Treaties  
and any Community instrument issued under any of  
the Treaties to which the Act is intended to give effect.

(2) The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) shall be no more than is appropriate in the circumstances.

(3) Nothing in this section shall be construed as authorising the consideration of reports of proceedings in Parliament for any purpose for which they could not be considered apart from this section. 5

Principles of interpretation.

2. The following shall be included among the principles to be applied in the interpretation of Acts where more than one construction of the provision in question is reasonably possible, 10 namely—

- (a) that a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not; and
- (b) that a construction which is consistent with the international obligations of Her Majesty's Government is to be preferred to a construction which is not; and
- (c) that, in the absence of any express indication to the contrary, a construction which would exclude retrospective effect is to be preferred to a construction 15 which would not.

Application to Measures, Orders in Council and subordinate legislation.

3. Sections 1 and 2 above shall apply to Measures and with the necessary modifications to Orders in Council (whether made by virtue of any Act or by virtue of Her Majesty's prerogative) and to orders, rules, regulations and other legislative instruments 25 made by virtue of any Act (whether passed before or after this Act), as they apply in relation to Acts.

Citation and extent.

4.—(1) This Act may be cited as the Interpretation of Legislation Act 1981.

(2) This Act shall extend to Scotland and Northern Ireland.



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